Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
October Term 1996
No. _____

ARNOLD HOLMBERG,
Petitioner.

CITY OF RAMSEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND APPENDIX TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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Questions Presented

1. Is the Ramsey, Minnesota Adult Entertainment Zoning Ordinance unconstitutionally overbroad in violation of the First and Fourteenth Amendments to the United States Constitution, in that it is not narrowly tailored to those uses shown to have caused adverse secondary effects?

2. Is the ordinance unconstitutionally vague, in violation of the First and Fourteenth Amendments to the United States Constitution?

3. Did a genuine issue of material fact exists as to whether the Ramsey, Minnesota Adult entertainment Zoning Ordinance is content-based, rather than a legitimate attempt to regulate adverse secondary effects?

Parties and Proceedings Below

The parties to the proceeding below were the City of Ramsey, a municipal corporation, as Plaintiff and Larry Holmberg and the Amusement Center, Inc., a Minnesota corporation, defendants. During the pendency of the appeal, the Defendants sold their interest to Arnold Holmberg, who brings this action as Petitioner.[1]

Review is sought of the decision of the Minnesota Supreme Court, filed August 6, 1996. The Minnesota Supreme Court's decision is unrecorded and set forth in the Appendix at A.1. The Minnesota Supreme Court's decision refusing to grant review of the decision of the Minnesota

[1] During the pendency of the appeal in this matter, Larry Holmberg and the Amusement Center Inc., the original defendants, conveyed their interest in the subject premises to Petitioner Arnold Holmberg. This fact is reflected in the opinion of the Minnesota Court of Appeals. See 548 N.W. 2d at 303 n.1, Appendix at A. 3 n.1

court of Appeals reported as City of Ramsey v. Holmberg, 548 N.W. 2d 302 (Minn. App. May 28, 1996), a copy of which is set forth in the Appendix at A.2 - A.10.

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Jurisdiction

Review is sought of a decision of the Supreme Court of the State of Minnesota, entered August 6, 1996. Jurisdiction is based upon Title 28 U.S.C. Sec. 1257(a).

Constitutional and Statutory Provisions Involved

This case involves the First and Fourteenth Amendments to the United States Constitution, the text of which are set forth in the Appendix at A.52, and Ramsey City Ordinance No. 90-23, pertinent portions of which are set forth in the Appendix at A.44 - A.51.

Statement of the Case

Respondent commenced the present action against Petitioner's predecessors in interest to seek a permanent injunction enforcing the provisions of Ramsey Ordinance No. 90-23, enacted by the Ramsey City Council in November of 1990. The Ordinance regulates the location of so-called adult uses within the City of Ramsey.

The ordinance, at Section 9.02, defines the term "adult uses" as follows:

> "Adult uses include adult bookstores, adult motion picture theaters, adult motion picture rental, adult mini-motion picture theaters, adult massage parlors, adult steam room/bath house/sauna facilities, adult companionship establishments, adult rap/conversation parlors, adult health/sports clubs, adult cabarets, adult novelty businesses, adult motion picture arcades, adult modeling studios, adult hotel/motels, adult body painting studios, and

all other premises, enterprises, establishments, businesses or places open to some or all members of the public, at which there is an emphasis on the presentation, display, depiction or description of 'specified sexual activities' or 'specified anatomical areas' which are capable of being seen by members of the public." Petitioners' Appendix at A.45- A.46.

The same section defines the term "adult use/bookstore" as follows:

"A building or portion of a building used for barter, retail or sale of items consisting of printed matter, pictures, slides, records, audio tape, video tape, or motion picture film if such building or portion of a building is not open to the public generally but only to one or more classes of the public extending (sic) any minor by reason of age or if a substantial or significant portion of such items are distinguished or characterized on the emphasis on the depiction or description of 'specified sexual activities' or 'specified anatomical areas.'" Id. at A.47 - 48.

The same ordinance defines the term "adult use -- motion picture arcade" as follows:

"Any place to which the public is permitted or invited where in coin or slug-operated or electronically or electrically or mechanically-controlled still or motion picture machines projectors or other image-producing devices

are maintained to show images to five or fewer persons per machine at one time, and where the images so displayed are distinguished or characterized by an emphasis on depicting or describing 'specified sexual activities or specified anatomical areas.'" Id. at A.49 - 50.

The ordinance further defines the term "adult use -- novelty business" as:

"A business which has as a principal activity the sale of devices which stimulate human genitals or devices which are designed for sexual stimulation." Id. at A.50.

Finally, the definition section of the ordinance distinguishes between "adult uses--principal," which it defines as a business establishment having more than "ten percent of its stock in trade or floor area allocated to, or more than 20 percent of its gross receipts derived from, any adult use," and "adult uses accessory," in which under 10 percent of the stock in trade or floor area or under 20 percent of the gross receipts are derived from adult uses. Id. at A.47.

Prior to the commencement of this action, Petitioner's predecessors had previously unsuccessfully challenged the constitutionality of Ramsey Ordinance No. 90-23. See Schneider v. City of Ramsey, 800 F. Supp. 815 (D. Minn. 1992), aff'd sub. nom. Holmberg v. City of Ramsey, 12 F. 3d 140 (8th Cir. 1993), cert. denied, 115 S.Ct. 59, 130 L.Ed. 2d 17 (1994). In the federal action, Petitioner's predecessors alleged that at the time of the commencement

of the federal action in 1990, their operation featured three separate and distinct adult uses as defined in the ordinance, to-wit: an adults-only bookstore, an adults-only movie arcade, and an adult business -- novelties, and that the location of the establishment violated Ordinance No. 90-23, in that the establishment was located within 1,000 feet of residentially zoned property and within 1,000 feet of a licensed day care center.[2]The federal action challenged the facial constitutionality of Ordinance No. 90-23 on the following bases:

a. The ordinance was enacted without sufficient empirical support as to its necessity to combat adverse secondary effects, rendering the ordinance not a content-neutral regulation of location, but rather an impermissible content-based censorship.

b. The operation and effect of the ordinance would be to ban adult entertainment totally from the City of Ramsey, or at least substantially curtail its availability.

c. That the stated purpose of the ordinance was merely pretextual, in light of the absolute ban on adult entertainment created in fact.

d. Because the ordinance amortizes out of existence adult entertainment businesses in a manner not done to any other non-conforming use, the ordinance violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. See Petitioner's Appendix at A.102 - A.103.

In the federal action, the District Court upheld the

[2]See complaint in the federal action, paragraphs 23(a) and (b), Petitioner's Appendix at A.91 - A.104.

facial constitutionality of the ordinance, holding that based upon the research of David Licht, a professional planner, and public hearings:

> "[T]he City concluded that adult uses create secondary effects in the community, including increased crime, increased health risks, diminished property values, and general neighborhood blights. It found that these effects are particularly experienced when the adult use is accessible to minors or located near residential property or related residential uses such as schools, day care centers, libraries, or parks. It found that special regulation of uses is necessary to assure that adverse secondary effects would not contribute to or enhance criminal activity in the area of such uses nor contribute to the blighting or downgrading of the surrounding property and lessening of its value." 800 F. Supp. at 819.

However, the District Court in the federal action also specifically found that with one exception, there was no evidence that Respondents' adult bookstore, as then constituted,[3] in fact had generated adverse secondary effects. The U.S. District Court specifically noted:

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[3] As already noted, supra, the store at the time of the federal litigation the stock in trade for retail consisted of entirely sexually explicit magazines, videos, and rubber goods, and featured a video arcade for on-premises viewing of sexually explicit materials.

> "[Licht] was not able to document an actual decrease in property values the City based on the short period of time the adult business had been open in the city. The police reports consisted largely of complaints of protesters at the business about the operation of the business and the conduct of its workers, and complaints from Larry Holmberg about the conduct of the protesters." Id. at 819.

The U.S. District Judge further noted that subsequent to the adoption of the ordinance, "There has been no evidence of decreased property values in the vicinity of the adult business (footnote omitted)." Id. at 820. The omitted footnote specifically noted that after Licht's report was presented to the City Council, a group of property owners persuaded the City to reduce property taxes by 25 percent, to reflect an alleged loss of property values. Following an investigation by the senior appraiser in the Anoka County Assessor's office, the Anoka County Board of Adjustment reversed this decision. See Id. at 820, n. 2.

The only secondary effect shown subsequent to the enactment of the ordinance was "high risk sexual conduct" in the motion picture viewing booths at the business. The District Court concluded that the evidence of such activity in the viewing booths "shows actual adverse secondary effects since the adoption of Ordinance No. 90-23." Id. at 820.

In upholding the constitutionality of the ordinance, the District Court specifically found that since Respondents' business clearly fell within the definition of adult-uses principle, Respondents lacked standing to challenge the overbreadth of those definitions. See Id. at 822, n.3.

After the United States District Court's decision was affirmed by the Eighth Circuit,[4] Petitioner's predecessors substantially modified the operation of the bookstore. Specifically they sealed off from the public the entire video booth area, so there was no on-premises consumption of sexually explicit material taking place on the premises. This in fact eliminated the only activity at the store found by the United States District Court to cause any adverse secondary effects.[5] Secondly, they substantially changed the amount of retail merchandise available for sale, altering the nature of the bookstore, to make it akin to the "Fantasy House" chain of stores, such as the one in Fridley, Minnesota. (Petitioner's Appendix at A.59)

In an affidavit submitted by a clerk at the store, not only were the video booths physically blocked off from public access, but the video tape viewing booths were disconnected from electrical power so they were non-functional (Petitioner's Appendix at A.59) Of the remaining floor space, only 40 percent was devoted to sexually explicit material, in the nature of books, magazines, video tapes or novelties, and the remaining 60 percent was devoted to such items as motorcycle magazines, car magazines, hunting magazines, and Popular Mechanics type of magazines (Id. at A.59).

As part of their submissions in opposition to Respondents' motion for summary judgment, Petitioner's predecessors included the affidavit of Robert Bruce

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[4] See Holmberg v. City of Ramsey, 12 F. 3d 140 (8th Cir. 1993).

[5] See 800 F. Supp. at 820.

McLaughlin, a former city planner, who has conducted extensive review of the studies relied upon by city planners to justify adult entertainment zoning ordinances. The affidavit provided, in pertinent part, as follows:

> "3. As such, I have personally read and become familiar with virtually all of the published literature related to adverse secondary effects of adult entertainment, and have personally reviewed most of the unpublished literature relied upon by municipal governments as it related to adverse secondary effects of adult entertainment zoning.
>
> 4. Based upon your affiant's extensive professional experience, your affiant has yet to find a single municipality or city planner that has ever studied the adverse secondary effects of general book and video stores, featuring adults-only sections consisting of a minority of the floor space, and featuring no on-premises consumption of sexually explicit material.
>
> 5. All of the adult entertainment studies relied upon by any municipality have uniformly been of adults-only theaters; adults-only bookstores, which have consisted of virtually 100 percent sexually explicit material and featuring on-premises consumption of said material through coin-operated "peep shows"; and alcoholic and non-alcoholic bars featuring live nude dancing.
>
> 6. The reason that general video stores

with adults-only sections have never been the subject of secondary effect studies has nothing to do with the newness or novelty of such entertainment forms; such entertainment forms had been common throughout the United States for at least 15 years and have been well known to city planners for that entire period of time.

7. Rather, the reason such entertainment forms have never been the form of secondary effects studies is the fact that such entertainment forms have been universally recognized as materially different in nature from adults-only bookstores, adults-only motion picture theaters, and live nude dance entertainment.

8. The chief reason why nobody has studied the adverse secondary effect of general release video stores with adults-only sections is that no responsible city planner has ever seriously suggested that such entertainment forms cause the type of adverse secondary effects associated with adults-only theaters and adults-only bookstores, featuring on-premises consumption of such materials." Petitioner's Appendix at A.56 - A.57.

Upon this record, the District Court, by the Honorable James A. Morrow, District Judge, granted Respondent's motion for summary judgment in part and

denied it in part.[6]

However, the District found that genuine issues of material fact remained as to two issues:

> "First, whether the zoning ordinance is reasonably believed to be relevant to the problem that the City of Ramsey seeks to address; and second, whether the zoning ordinance is sufficiently narrowly tailored to affect only that category of businesses shown to produce unwanted secondary effects."
> Petitioners' Appendix at A.41 - A.42.

In holding that a genuine issue of material fact existed, Judge Morrow specifically noted that because Petitioner's predecessors had changed the nature of their store to eliminate on-premises consumption of sexually explicit material, and because they were precluded from raising an overbreadth challenge in federal court, Defendants were not barred from raising a constitutional challenge, based on overbreadth, in the present proceeding. The District Court wrote:

> "[B]ecause Defendants challenged the zoning ordinance from the position of an adult bookstore with on-premises consumption of adults-only material and because the studies apparently show that other cities have

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[6] Judge Morrow granted the motion for summary judgment, insofar as it found that Respondents' use of the property at its current location was prohibited under the City's ordinance, that Defendant Holmberg was properly served by publication, and that the initial enactment of the zoning ordinance was a legitimate content-neutral time, place, and manner regulation. See Petitioner's' Appendix at A.21 - A.22. Petitioner does not seek review of those decisions.

> experienced adverse secondary effects from adult bookstores with on-premises consumption of adults-only material, it seems that Defendants would have been precluded from raising the overbreadth of the provisions as a constitutional challenge to the ordinance, since they clearly fell within the core of the zoning ordinance provision. [Citation omitted.] Judge Murphy appropriately held so when Defendants attempted to challenge the adults-use accessory provisions of the ordinance. [Citations omitted.]
> Whether the studies relied upon before the City of Ramsey before enacting the zoning ordinance address the adverse secondary effects of adult bookstores without on-premises consumption of adults-only materials and whether the ordinance is sufficiently narrowly drafted to correspond with the studies' findings are disputed issues of material fact. These two issues must therefore be reserved for trial and Plaintiff's Motion for Summary Judgment and a permanent injunction must be denied."
> Petitioner's ' Appendix at A.42.

In its renewed motion for summary judgment, Respondent tendered copies of all of the studies relied upon by the City of Ramsey in enacting its ordinance, and also all of the studies relied upon by the City of Rochester in enacting the ordinance which was the subject of litigation in

ILQ Investments, Inc. v. City of Rochester, 816 F. Supp. 516 (D. Minn. 1992), rev'd 25 F. 3d 1413 (8th Cir. 1994), cert. denied, 115 S.Ct. 578 (1994).

In a responsive affidavit, Petitioner's planning expert, Robert Bruce McLaughlin indicated that he had personally reviewed all of the foregoing studies and that none of them dealt with adverse secondary effects of adult entertainment featuring no on-premises consumption. See Petitioners Appendix at A.63 - A.65.

Moreover, in addition, Petitioner noted that the only study of adverse secondary effects done by a governmental agency which considered an exclusively adult bookstore containing no on-premises consumption concluded that no adverse secondary effects resulted from the operation of such a store (Petitioners' Appendix at A.65). That study, done by the City of Daytona Beach is set forth in Petitioners' Appendix at A.73 - A.82. In particular, the study concerned the News Mart, located at 214 North Beach Street, featuring the sale of books and magazines. The study concluded:

> "There have been no problems at this business. Books are wrapped in plastic foil and customers are not allowed to read them. A separate area is marked off." Petitioners Appendix at A.77.

In addition, McLaughlin himself set forth in his Affidavit that in the City of Rochester, Minnesota, he had personally conducted a study featuring a bookstore with adult materials and no on-premises consumption, and several control uses, including conventional book and video stores. The study concluded that the store featuring adult materials and no on-premises consumption had no negative impact on

property values within the city, and there was no inordinate demand for police services, and no evidence of urban blight (Petitioner's Appendix at A.65).[7]

Notwithstanding the foregoing, the District Court granted summary judgment to Respondent as to the constitutionality of the ordinance as applied to Petitioner's use, which decision was upheld by a 2-1 margin by the Minnesota Court of Appeals,[8] and the Minnesota Supreme Court declined further review.

ARGUMENT

I. THE MINNESOTA COURT'S UPHOLDING OF RAMSEY ORDINANCE NO. 90-23 AGAINST AN OVERBREADTH CHALLENGE CREATES A CONFLICT BETWEEN THAT COURT AND THE HIGHEST COURTS OF OTHER JURISDICTIONS, AND CONFLICT BETWEEN THE MINNESOTA COURTS AND THIS COURT'S HOLDINGS, REQUIRING RESOLUTION BY THIS COURT.

In Young v. American Mini Theatres, 427 U.S. 50 (1976), and City of Renton v. Playtime Theaters Inc., 475 U.S. 41 (1986) this Court recognized the limited and narrow exception to the general rule government regulation of speech cannot be content-based; government may not treat person's speech differently from another, based upon the

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[7] A summary of Mr. McLaughlin's study concerning Rochester is set forth in Petitioners" Appendix at A.86 - A.88.

[8] See City of Ramsey v. Holmberg, supra, 548 NW 2d 302 (Minn. App. May 28, 1996).

content thereof.[9] The reasoning behind this limited exception created Young and Renton was that in permitting special zoning treatment for adult entertainment, defined by the content of the entertainment featured, the municipalities were not regulating the content of the material per se, but rather the "adverse secondary effects" caused by that particular genre of entertainment, effects such as a decline in property values, an increase in crime, and general blighting of the surrounding neighborhood. For example, in the plurality opinion in Young, written by Justice Stevens,[10] specifically noted the following:

> "In the opinion of urban planners and real estate experts who supported the ordinances, the location of several such businesses (adult theaters and other regulated business) in the same neighborhood tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere." 427 U.S. at 55.

The plurality opinion particularly relied on the fact that the ordinance was enacted in response to established "secondary effects" such as decline in property values and

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[9] Examples of where this Court has pronounced the general rule include Police Department of Chicago v. Mosley,408 U.S. 92 (1972); Regan v. Time, Inc., 468 U.S. 641, 648-649 (1984); Texas v. Johnson, 491 U.S. 397 (1989); Boos v. Barry, 485 U.S. 312 (1988).

[10] The 5-to-4 majority in Young came as a result of a plurality opinion, written by Justice Stevens, in which Chief Justice Burger, and Justices Rehnquist and White joined, and a concurring opinion by Justice Powell.

increase in crime rate, rather than objections to the content of the films shown, as a basis for enacting the ordinance. Mr. Justice Stevens, in his plurality opinion, specifically noted the following:

> "The Common Council's determination was that a concentration of 'adult' movie theaters causes the area to deteriorate and become a focus of crime, effects which are not attributable to theaters showing other types of films. It is this secondary effect which these ordinances attempt to avoid, not the dissemination of 'offensive' speech. In contrast, in Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S. Ct. 268, 45 L.Ed. 2d 125, the justifications offered by the city rested primarily on the city's interest in protecting its citizens from exposure to unwanted, 'offensive' speech. The only secondary effect relied on to support that ordinance was the impact on traffic -- in effect which might be caused by a distracting open-air movie even if it did not exhibit nudity." 427 U.S. at 71, n. 34
>
> In Renton, the Court upheld the validity of the ordinance only upon a showing that the ordinance was "narrowly tailored to affect only that category of theaters shown to produce unwanted secondary effects..." 475 U.S. at 52

In courts of many jurisdictions, including supreme courts of other states, have not hesitated to invalidate adult entertainment zoning laws, when those laws are not definitionally "narrowly tailored" to uses found to have

caused adverse secondary effects.

For example, numerous courts have held that adult entertainment zoning laws cannot be constitutionally applied to theaters which, on a single occasion, show a single adults-only film. See, for example, Pringle v. City of Covina, 115 Cal. App 3d 151 (1981); People v. Supreme Court (Lucero), 49 Cal. 3d 13 (1989); and Tollis v. San Bernardino County 827 F. 2d 1329 (9th Cir. 1987). In Tollis, the court clearly stated the appropriate test for measuring content-neutrality under Young-Renton type of ordinances.

> "To be acceptable as a content-neutral time, place, and manner regulation, an ordinance must be 'designed to serve a substantial governmental interest and allow for reasonable alternative avenues of communication.' [Citation to Renton omitted.] Here, the county has presented no evidence that a single showing of an adult movie would have any harmful secondary effects on the community. The county failed to show that the ordinance, as interpreted by the County to include any theater that shows an adult movie a single time, is sufficiently 'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects' [Citation to Renton omitted.]" Id. at 1332 - 1333.

Likewise, in Worldwide Video v. Tukwila, 117 Wash. 2d 832 (1991), cert. denied. 112 S.Ct. 1672 (1992), the Washington Supreme Court invalidated a municipal zoning ordinance which defined "adult entertainment" and "adult bookstore" as one which devoted more than ten percent of

its stock in trade to sexually explicit materials, as applied to an establishment dealing exclusively in take-home materials, pointing out that all the studies of adult entertainment which have lead to the conclusion that secondary effects are present have dealt with establishments featuring on-premises consumption of materials, such as theaters, large stage shows, coin-operated peep shows; none have establishments which deal solely in materials to be consumed at-premises have similar secondary effects. In a similar vein, the Supreme Court of Delaware in Richardson v. Wile, 535 A.2d 346 (Del. 1988) held that it would be unconstitutional to apply adult entertainment zoning laws to general release video stores with adult-only sections.

See also Sebago Inc. v. City of Alameda, 211 Cal. 3d (1989) rev. denied, (Cal. 1989), holding that adult entertainment zoning laws could not be constitutionally applied to "adult news racks," in the absence of any other evidence demonstrating that such businesses cause adverse secondary effects.

The Minnesota Court of Appeals rejected all of this persuasive and contrary authority from other jurisdictions and relied exclusively on ILQ Investments, Inc. v. City of Rochester 25 F. 4 1413 (8th Cir 1994), cert. denied, 115 S. Ct. 578 (1994), upheld the application of adult entertainment zoning laws to a business which offered exclusively off-premises consumption of adult materials in sixty percent of whose floor space featured material of a non-sexual nature.

Apart from the fact that ILQ Investments, Inc. is directly in conflict with far more persuasive authority from other jurisdictions, the analysis in that case is fundamentally flawed for at least two additional reasons:

First of all, as already noted, supra, adult entertainment zoning is a limited exception to the general rule absolutely prohibiting content-based distinction in speech, only where it can be shown that the regulation is not directed at the content of speech itself, but only against the adverse secondary effects created thereby. Therefore, to the extent that ILQ stands for the proposition that a city, having before it evidence that establishments which deal in 100 percent adult entertainment, with exclusively both on and off-premises consumption, can reasonably apply adult entertainment zoning regulations to any establishment featuring any amount of adult entertainment, on or off-premises consumption, it is plainly inconsistent with the underlying rationale of Young, Renton, and their progeny and should be rejected.

In this regard, the ILQ analysis was persuasively rejected to the court in Z.J. Gifts, Inc. v. City of Aurora, 932 F. Supp. 1256 (D. Colo. July 2, 1996). Citing the language in ILQ to the effect that, "even if Downtown Book & Video is a new type of adult business, it may not avoid time, place, and minor regulation that has been justified by the study of secondary effects of reasonably similar businesses,"[11] the court Z.J. Gifts stated:

> Respectfully, this analysis is flawed in that it is directed more toward the subjective intent of the city council then the objective effect of the freedom to communicate.
>
> In the many cases which have addressed the problem of sexually oriented businesses and the efforts of

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[11] 25 F. 3d at 1418, cited 932 F. 2d at 1258.

communities to restrict them, the analyses undertaken have followed a pattern of repeating the litany from the Supreme Court in [Renton] and other cases that such cases are content neutral because they are not designed to suppress the content of speech - only the secondary effects of sexually oriented speech on the neighborhood. There can be no quarrel with that approach in those cases where those effects are well documented in the types of studies which were used by Aurora in considering this Ordinance. If the plaintiff had booths for peep shows on its premises, the issues in this case would then deal with some of the particular restrictions which may be more than necessary to meet the governmental purpose of avoiding or mitigating those secondary effects. The problem here is that none of the material relied upon by the city council shows what the business of Christie's bears any relationship to such effects." Id. at 1258.

The court went on to note:

"If the Plaintiff's business is sufficiently dissimilar to the types of businesses associated with the undesirable secondary effects that are of legitimate governmental concern as shown on the studies relied upon by the defendant, then the application of the ordinance to Christie's store as sought by the defendant in the counterclaim is directed not at crime, public health, or property values. Instead it seeks to suppress the sexual messages in the store's inventory. In some, the only

> significant difference shown between the business of Christie's and the other retail businesses in this retail zone district is that Christie's sells explicit communications about sexual activity. Thus, it can be justified only by the reference to sexual content of plaintiff's business.
>
> There's an obvious difference between a package liquor store and a bar, and those differences are noted in liquor licensing requirements [Citation omitted.]
>
> There is also a qualitative difference as well as a quantitative distinction between sports arenas and sporting goods stores. It is difficult to believe that anyone would suggest that sporting goods stores must be limited to the same zoning areas as sports arenas based on a rise in crime or reduction in residential property values associated with sports arenas." Id. at 1259.[12]
>
> A grant of certiorari would resolve these clear conflicts between jurisdictions.

Secondly and perhaps more significantly, to the extent that decisions such as the instant case and ILQ Investments, Inc., reached the results they did premised upon the notion that courts must defer to legislative determinations as to the

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[12] The court further noted that similar difference existed between the establishment providing sexual entertainment for consumption on premises, and a cable television system broadcasting sexually explicit entertainment in the home, relying on Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communications Commission, 116 S. Ct. 2374 (1996). See 932 F. 2d at 1260.

significance of the state interest being advanced, whether those interests are directly advanced, and whether the solution is appropriately narrowly tailored, those decisions are plainly no longer good law in light of this Court's decision. In 44 Liquormart v. Rhode Island, ___ U.S. ___, 116 S. Ct. 1495 (May 13, 1996), in which this Court expressly overruled Posadas De Puerto Rico Associates v. Tours & Co. at P.R., 478 U.S. 328 (1986), requiring deference to legislative judgments in those matters.[13]

Secondly, the record before this Court is far different than was the record before the Court in ILQ, Investments, Inc., supra. In ILQ, the only legislative history before the Court was the City's studies establishing that adult entertainment caused various adverse secondary effects. The ILQ court concluded that based upon that record, the City Council could reasonably have believed that the adult entertainment zoning ordinance enacted was relevant to the secondary effects problems caused. However, the record in

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[13] In the Central Hudson Gas & Elec. Corp. v. Public Service Commission of N.Y., 447 U.S. 557, (1980), the United States Supreme Court advanced the following test for juding the validity of commercial speech which is not misleading or deceptive: First, that the governmental interest in the regulation be substantial, that the regulation in question directly advance the interest, and that the regulation in question be narrowly tailored, so thta it is not more extensive than necessary to serve that interest. In Renton, and more particulary in Ward v. Rock Against Racism, 491 U.S. 781 (1989), the Court adopted the following tests for determing the validity of a content-neutral time, place, and manner regulation: the regulation must serve a substantial government interest, unrelated to the suppression of free expression, it must be narrowly tailored to serve that interest, and must leave available alternative avenues of communication. Given the extreme similarity of the tests for commercial speech and time, place, and manner regulation, there appears to be no principled reason for treating the two tests differently.

the instant case is far different. It consists not only of the studies relied upon in the City's original enactment of the ordinance, which generally show the existence of adverse secondary effects; but also consists of two studies which conclusively demonstrate no adverse secondary effects from purely take-home entertainment and demonstrate that the percentage of adults-only material sold at a given store is irrelevant to secondary effects, of the City's own experience with the very use in question, showing that the only adverse secondary effects related to on-premises motion picture view booths, which have been eliminated. Therefore, even assuming ILQ was correctly decided on the record before the court in that case, that in no way supports the conclusion that ILQ commands the same result in the face of a totally different set of facts.

II. EVEN IF THE ORDINANCE IN QUESTION WERE NOT UNCONSTITUTIONALLY OVERBRAOD, IT WOULD BE UNCONSTITUTIONALLY VAGUE.

The alternative definition of adult use-principal is that no more than 20 percent of its gross receipts be from an adult use.[14] However, the ordinance is silent on the question of the time period over which the 20 percent is to be calculated. If on a given day, 10 people purchase Hustler magazines, and no one buys any Popular Mechanics or other non-sexual items, is the store in violation of the ordinance on that day? Must a store owner sell $8.00 of non-sexual material before he can sell $2.00 of sexually explicit material? There is plainly no reasonable basis upon which a store

[14] See definition of "Adult uses principal," Petitioners' Appendix at A.47.

owner can comply with such a regulation.

At least one court has held that a similar zoning ordinance is unconstitutionally vague, in that it is impossible to know how to comply with it. See Alexander v. City of Minneapolis, 535 F. Supp. 1162 (D Minn. 1982), aff'd 698 F. 2d 936 (8th Cir. 1983).

III. IN THE ALTERNATIVE A GENUINE ISSUE OF MATERIAL FACT FOR TRIAL EXISTS AS TO WHETHER ESTABLISHMENTS WHICH DEAL EXCLUSIVELY IN TAKE-HOME CONSUMPTION CAUSE ANY ADVERSE SECONDARY EFFECTS.

Even assuming a patently absurd proposition that a City Council could conclude that because an establishment which features 100 percent adults-only material and has on-premises consumption of such material causes adverse secondary effects, the same secondary effects are caused by an establishment with only 11 percent adult material and no on-premises consumption, that does not answer the question raised by the doctrine enunciated by the United States Supreme Court in United States v. Carolene Products Co., 304 U.S. 144 (1938), in which the Court stated:

> "Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice...the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." 304 U.S. at 153, 58 S.Ct. at 784.

In this regard, the decision of the district court in the

instant case is plainly in conflict with the decision of Third Circuit in New Jersey Citizens Action v. Edison Township, 797 F.2d 1250 (3d Cir. 1986), in which the court invalidated, under the First Amendment, an ordinance prescribing door-to-door political canvassing and soliciting after 5 p.m. In doing so, the court overruled a panel the same court had made only two years earlier in Pennsylvania Alliance for Jobs & Energy v. Council of the Borough Munhall (PAJE), 743 F.2d 182 (3d Cir. 1984), in that the Plaintiffs in the latter case made a factual showing that solicitations after 5 p.m. did not contribute to burglary which was the factual basis for upholding the ordinance in the earlier decision.

Likewise, in the instant case, a district court had before it uncontradicted evidence from studies in other jurisdictions that plainly demonstrated that take-home establishments do not cause the same adverse secondary effects as do establishments which feature on-premises consumption. This plainly creates, at minimum, a genuine issue of material fact for trial.[15]

CONCLUSION

For all of the foregoing reasons, the writ of certiorari should be issued to the Minnesota supreme Court, and the decision of the Minnesota Supreme Court should be reversed.

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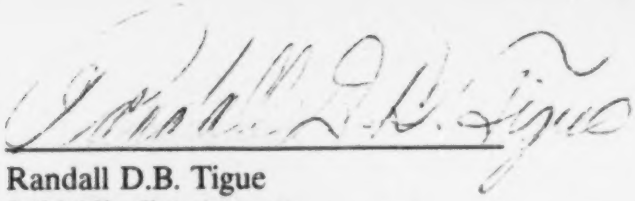
[15] In this regard, See Z.J. Gifts v. City of Aurora, supra, 932 F. Sup. 1256, 1258 (D. Colo. July 23, 1996), in which the court noted that there was no evidence that the Plaintiff's similar business establishment in another city had caused adverse secondary effects and no evidence that the business had caused adverse secondary effects in the city of Aurora in 2 ½ years.



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Dated: November 1, 1996.

APPENDIX

Order of Minnesota Supreme Court denying further review A.1

Opinion of Minnesota Court of Appeals . A.2

Order and Memorandum of Judge Ellen Maas of Anoka County District Court . A.ll

Order and Memorandum of James Morrow of Anoka County District Court . A.21

Pertinent portions of text of Ramsey City Ordinance No. 90-23 . . . . A.44

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Joint Answer of Defendants A.53

Affidavit of Robert Bruce McLaughlin, dated ll/l/94 . . . . . A.56

Affidavit of Cammille Nelson . . A.59

Affidavit or Robert Bruce McLaughlin, dated 4/13/95 and supporting exhibits A.6l

Affidavit of Randall D.B. Tigue and Exhibit A.83

Affidavit of Larry Allan Holmberg . . A.89

Amended Complaint in federal litigation . A.9l

STATE OF MINNESOTA
IN SUPREME COURT
C5-95-2346

City of Ramsey,

Respondent,

vs.

Arnold Holmberg,

Appellant.

ORDER

Based upon all of the files, records and proceedings herein,

IT IS HEREBY ORDERED that the Petition of Arnold Holmberg and the conditional petition of the City of Ramsey for further review be, and the same are, denied.

IT IS FURTHER ORDERED that the requests of the League of Minnesota Cities and the Minnesota Civil Liberties Union to serve and file briefs as amicis curiae are accordingly denied.

Dated: August 6, 1996.

BY THE COURT:

/s/

Chief Justice

Finance and Commerce Appellate Court Edition May 31, 1996

COURT OF APPEALS

CIVIL OPINIONS

State of Minnesota

In Court of Appeals

City of Respondent,

Respondent,

vs.

Arnold Holmberg,

Appellant.

Filed May 28, 1996

Affirmed

Schumacher, Judge

Davies, Judge (Dissenting)

Anoka County District Court

File No. C9-94-3310

James J. Thomson, Kennedy & Graven, chartered, 470 Pillsbury Center, Minneapolis, Minnesota 55402 (for Respondent)

Randall D.B. Tigue, Patrice M. Feterl, 2620 Nicollet Avenue, Minneapolis, Minnesota 55408 (for Appellant)

Considered and decided by davies, Presiding judge, Parker, Judge and Schumacher, Judge

SYLLABUS

1. This court will not address an issue decided adversely to a Respondent if the Respondent fails to file a notice of review.

2. City of Ramsey Ordinance 90-23, which regulates the location of adult businesses, is a constitutionally valid restriction on the time, place, and manner of speech and is not impermissibly overbroad.

3. City of Ramsey Ordinance 90-23 is not vague merely because it does not specify a time period in which the percentage of revenue derived from the sale of adult goods must be calculated.

OPINION

SCHUMACHER, Judge (Hon. Ellen L. Maas, District Court Trial Judge)

Larry Holmberg and the Amusement Center, Inc.[1] appeal from summary judgment granted to respondent City of Ramsey (the city), arguing that a zoning ordinance is overbroad and vague. We affirm.

FACTS

Larry Holmberg (Holmberg) owned and operated a business in the city called the Amusement Center, Inc. When it opened in 1990, it sold adult books, magazines, and novelties; it also operated booths for viewing adult movies. At the time the Amusement Center opened, the city had no ordinances governing the location of adult businesses, and there were no other adult businesses operating in the city. The city council decided to study how adult businesses affect neighborhoods and hired a professional city planner to investigate. The planner complied and analyzed neighborhood impact studies from other cities and assessed the city's general zoning plan. Based on the planner's report and the city planning commission's recommendation, the city council concluded that adult businesses like the Amusement Center produce negative "secondary effects," such as increased crime, lower property values, and general neighborhood blight.

The council amended the city's zoning ordinance to categorize adult businesses into either "adult use principal" or "adult uses-accessory." Under the ordinance, an adult use is a business emphasizing the display or description of certain sexual activities or anatomical areas. An adult use-principal business is defined as one having more than 10% of stock or floor area allocated to, or more than 20% of gross receipts derived from, any adult use. An adult uses-accessory business

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[1]After this matter was fully briefed, argued and submitted to this court for decision, Larry Holmberg and the Amusement center, Inc., conveyed to Arnold Holmberg their interests in the business and real estate subject to the injunction at issue in this appeal. Accordingly, Arnold Holmberg has been substituted as the appellant in the caption of the case, but because Larry Holmberg and the Amusement Center, Inc., litigated this case in the district court and in this court, we continue to refer to them in our opinion.

is defined as one having 10% or less of stock or floor area devoted to, or 20% or less of receipts derived from, adult movie rentals or magazines sales. The ordinance provides that an adult use-principal business must be located at least 1,000 feet from certain protected uses, including residential zones, day-care centers, schools, parks liquor stores, and churches. The Amusement Center violated the ordinance because it was an adult use-principal business and was located within 1,000 feet of residentially-zoned property, a day-care center, a church, and a bowling alley that serves liquor.

Holmberg unsuccessfully challenged the constitutionality of the ordinance in a federal court action, arguing that it violated the First and Fourteenth Amendments. **Schneider v. City of Ramsey,** (D. Minn. 1992), **aff'd sub nom. Holmberg v. City of Ramsey,** 12 F. 3d 140 (8th Cir. 1993), **cert. denied,** 115 S.Ct. 59 (1994).

The city then brought this action seeking declaratory relief and an injunction preventing Holmberg from operating his business. In opposition to the city's motion for summary judgment, Holmberg contended the ordinance was unconstitutional as applied to his changed business. Holmberg noted that he changed his business by eliminating the viewing booths and adding non-adult merchandise so that only 25% of the stock and floor area was devoted to sexually-oriented material. Holmberg argued that because the nature of his operation at the time of the federal litigation prevented him from raising an overbreadth claim, the doctrines of collateral estoppel and res judicata did not prevent him from again litigating the constitutionality of the ordinance.

The district court granted in part and denied in part the city's summary judgment motion. The court granted the motion with respect to the city's claim that the ordinance is a content-neutral time, place, and manner regulation. The court denied the remainder of the motion, concluding that there were genuine issues of material fact about (1) whether the studies relied on by the city address the effects of adult bookstores with no on-premises consumption of material and (2) whether the

ordinance affects only the types of businesses shown to produce unwanted secondary effects. The court invited the city to supplement the record and stated that if the city could show there were no issues of material fact regarding these two factors, "a permanent injunction should issue."

The city renewed its motion for summary judgment and submitted copies of all the materials relied on by the city when it enacted the ordinance. The district court found that, based on the expanded record, the ordinance was constitutional and granted the city's request for a permanent injunction. Judgement was entered for the city.

ISSUES

1. Are the issues of res judicata or collateral estoppel properly before this court?

2. Is the city's zoning ordinance unconstitutionally overbroad?

3. Is the city's zoning ordinance unconstitutionally vague?

ANALYSIS

1. The city argues that Holmberg is precluded by the doctrines of res judicata and collateral estoppel from litigating the constitutionality of the ordinance. Holmberg contends, and we agree, that this issue is not properly before this court because the city did not file a notice of review.

Even if the judgment below is ultimately in its favor, a party must file a notice of review to challenge the district court's ruling on a particular issue. **Arndt v. American family Ins. Co.,** 394 N.W. 2d 791, 793 (Minn. 1986). If a party fails to file a notice of review pursuant to Minn. R. Civ. App. P. 106, the issue is not preserved for appeal and a reviewing court cannot address it. **Potter v. LaSalle Sports & Health Club,** 368 N.W. 2d 413, 418 (Minn. App. 1985), **aff'd**, 384 N.W. 2d 873 (Minn. 1986). Under 413, 418 (Minn. App. 1985), **aff'd** 384 N.W. 2d 873 (Minn. 1986). Under this procedural posture of this case, it is appropriate for this court to review both of the district court's orders on the city's motions for summary judgment. **See** Minn. R. Civ. App. P. 103.04 (on appeal from

judgment, appellate court may review any order involving merits or affecting judgment).

The city argued to the district court that the constitutionality of the zoning ordinance was fully litigated in the federal action, and res judicata or collateral estoppel barred the claim in state court. The district court ruled against the city on this issue. In its order filed January 20, 1995, the district court ruled that in the federal litigation, Holmberg

> would have been precluded from raising the overbreadth of the provisions as a constitutional challenge***,since[he] clearly fell within the core of the zoning ordinance provision.

See Dorso Trailer Sales v. American Body & Trailer, 482 N.W. 2d 771, 774, (Minn. 1992) (res judicata only bars matters that were litigated or could have been litigated). In its renewed summary judgment motion, the city did not argue res judicata or collateral estoppel, and in its September 5, 1995, order, the district court did not address the issue, stating that it was bound to follow the rule of case as determined by its first order. Because the issue was decided adversely to the city, the city was required to file a notice of review in order for this court to address it.

2. Determining whether an ordinance is constitutional is a question of law, and this court need not defer to the district court's conclusions. **In re Billie,** 494 N.s. 2d 877, 881 (Minn. 1993). An ordinance is presumed constitutional and the burden of proving otherwise rests on the party attacking its validity. **City of St. Paul v. Daisin,** 245 Minn. 325, 329, 71 N.W. 2d 855, 858 (1955). An overbroad restriction of expression is unconstitutional. **New York v. Ferber**, 458 U.S. 747, 769, 102, S.Ct. 3348, 3361 (1982). The doctrine of overbreadth, which invalidates entire statutes, is "'strong medicine'" and should be applied cautiously. **Osborne v. Ohio,** 495 U.S. 103, 122, 110 S.Ct. 1691, 1703 (1990) (quoting **Broadwick v. Oklahoma,** 413 U.S. 601, 613, 93 S. Ct. 2908, 2916 (1973).

Because the city's ordinance does not ban adult

businesses completely, but merely limits the areas in which they may operate, it is properly analyzed as a time, place, and manner regulation. **See City of Renton v. Playtime Theatres,** 475 U.S.41, 46, 106, 106 S.Ct. 925,928 (1986), (time, place, and manner regulation analysis applies where ordinances does not ban adult business altogether, but merely regulates its location). Such regulations are valid if they are content-neutral and are "designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." **Id.** at 47, 106 s.Ct. at 928.

Local governments may restrict adult businesses in order to curb their unwanted "secondary effects." **Id. at** 106 S.Ct. at 929-30. In determining whether the secondary effects of adult businesses justify regulation, a city is not required to conduct its own study, but may rely on the studies and experiences of other cities,

> so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. **Id.** at 51-52, 106 S.Ct. at 931.

Holmberg argues that the ordinance is overbroad in its definition of "adult use-principal" because it is not limited to the specific types of businesses that have been shown elsewhere to cause adverse secondary effects. He claims no studies have shown that businesses such as his current operation --those with off-premises consumption and a majority of stock and floor space devoted to non-adult material--cause undesirable secondary effects. This same argument was rejected by the Eighth Circuit in **ILQ Investments v. City of Rochester,** 25 F. 3d 1413 (8th Cir.), **cert. denied** 115 S.Ct. 578 (1994). In **ILQ**, an adult business argued that it was unreasonable for the City of Rochester to rely on other cities' studies because they did not address similar businesses-those that offer non-sexually explicit as well as sexually explicit materials and do not allow on-premises consumption of such materials. **Id.** at 1417. The court soundly rejected this argument, stating:

> That is simply not the law *** Under **City of**

> **Renton,** Rochester need not prove that Downtown Book and Video would likely have the exact same adverse effects on its surroundings as the adult businesses studied by Indianapolis, St. Paul, and Phoenix. So long as Ordinance No. 2950 affects only categories of businesses reasonably believed to produce at least some of the unwanted secondary effects, Rochester "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." ***Even if Downtown Book and Video is a new type of adult business, it may not avoid time, place, and manner regulation that has been justified by studies of the secondary effects of reasonably similar businesses.

Id. at 1418 (footnote omitted) (quoting **Young v. American Mini Theatres, Inc.,** 427 U.S. 50, 71, 96 S.Ct. 2440, 2453 (1976) (plurality opinion)).

We find the district court was correct in concluding that in this case, as in **ILQ,** the city's reliance on voluminous studies, reports, and reference materials satisfies the **City of Renton** test. Any businesses affected by the ordinance are those that the city reasonably believed cause undesirable secondary effects.

The council had before it a planning report that specifically addressed the city's concerns. In preparing the report the planner examined articles, reports, and background materials from throughout the United States, as well as information provided by the city. In addition to the planning report, the city examined reports from the cities of Rochester, St. Paul, Phoenix, and Seattle, which deal with "reasonably similar businesses." As the district court noted, most of the studies and reports relied on by the City of Ramsey "are the same studies upon which the City of Rochester relied in **ILQ.**" The council had before it a planning report that specifically addressed the city's concerns. In preparing the report, the planner examined articles, reports, and background materials

from throughout the United States, as well as information provided by the city. In addition to the planning report, the city examined reports from the cities of Rochester, St. Paul, Phoenix, and seattle, which deal with "reasonably similar businesses." As the district court noted, most of the studies and reports relied on by the City of Ramsey "are the same studies upon which the City of Rochester relied in **ILQ**.." The council had sufficient information about adult businesses in general to enact a valid ordinance.

Holmberg argues that the record here--unlike that in **ILQ** consists of two studies showing that the sale of purely take-home merchandise does not produce unwanted secondary effects. These studies were not before the city, however, at the time it enacted the ordinance. Moreover, they fail to raise a genuine issue as to whether the city reasonably believed that the businesses to which the ordinance applies produce at least some of the unwanted secondary effects experienced by other cities.

3. Part of the definition of an "adult use-principal" business is that more than 20% of gross receipts are derived from an adult use. Holmberg argues that the ordinance is vague because it does not specify a time period during which the 20% figure is to be calculated. We disagree. The lack of a definite time period in which to apply the terms of the ordinance is not fatal. **See generally Humenansky v. Minnesota Bd. of Medical Examiners,** 525 N.W. 2d 559, 564 (Minn. App. 1994) (statute is not unconstitutionally vague merely because some marginal fact situation may pose difficulty of application), **review denied** (Minn. Feb. 14, 1995)

DECISION

Ordinance 90-23 is neither impermissibly overbroad nor vague.

Affirmed.

DAVIS, Judge (dissenting)

I respectfully dissent.

In prior litigation it was determined that the City of Ramsey ordinance was neither facially unconstitutional nor

unconstitutional as applied in Amusement Center, Inc. **Holmberg v. City of Ramsey,** 12 F. 3d 149 (8th Cir. 1993), **cert. denied,** 115 S.Ct. 59 (1994) (**Holmberg I**). Holmberg now contends, however, that Amusement Center's operation is significantly different from its prior business. Holmberg seeks again to challenge--on constitutional grounds--the application of the ordinance in Amusement Center.

In my view, Amusement Center's current off-sale operation is so significantly different from its prior on-sale business that Holmberg should have the opportunity to again challenge the ordinance on constitutional grounds; not facially, of course, but as applied to his current operation.

The on-sale/off-sale distinction is fundamental. Amusement confronts the court with an issue regarding the underpinnings of the ordinance distinct from the question faced in **Holmberg I.** The finding of constitutionality in **Holmberg I** would not be controlling as to Holmberg in his current conduct of this significantly different off-sale business.

ILQ Investments v. City or Rochester, 25 F. 3d 1413 (8th Cir.) **cert. denied,** 115 S.Ct. 578 (1994), likewise falls short of conclusiveness on the absence of on-sale/off-sale distinction that might be applicable to Holmberg.

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF ANOKA TENTH JUDICIAL DISTRICT

City of Ramsey,
Plaintiff,
vs.
Larry Holmberg and
the Amusement Center, Inc.,
Defendants.

ORDER
Court File No. C9-94-3310

This matter was heard on June 7, 1995 before the Honorable Ellen L. Maas, Judge of District Court. James Thomson, Esq., appeared on behalf of Plaintiff. Randall D.B. Tigue appeared on behalf of Defendant. The Court, upon reviewing the files, affidavits, and proceedings herein, and upon hearing the arguments presented, hereby makes the following:

ORDER

1. Plaintiff's request for summary judgment is GRANTED.
2. A permanent injunction shall issue.
3. All other motions are denied.
4. The attached memorandum is made part of this Order.

Dated: September 5, 1995

/s/
Ellen L. Maas
Judge of District Court

MEMORANDUM

FACTUAL AND PROCEDURAL HISTORY

This matter arises from Plaintiff, City of Ramsey's ("the City") motion for modification of Judge Morrow's January 20, 1995 Order, or in the alternative, summary judgment against Defendants. Larry Holmberg and the Amusement Center, Inc., permanently enjoining Defendants from operating the adult bookstore located at 6710 Highway 10 ("the property") in the City of Ramsey.

Since April 1990, The Amusement Center, Inc., has operated a business on the property consisting of the sale of adults-only books and magazines, the sale of sexual novelties and the in-store display of adults-only motion pictures in video booths. The video booths have been, removed or closed to the public. the business is located within 1,000 feet from residentially zoned property, a church, and an on-sale liquor establishment.

On November 13, 1990, the Ramsey City Council enacted Ordinance No. 90-23 which, in part, permanently amended the City code governing the zoning and regulation of adult uses. Under Ordinances No. 90-23, adult uses may operate in the City in B-3 and B-W zoning districts provided that they are at least 1,000 feet from certain uses, including residentially zoned property, churches, and on-sale liquor establishments. Adult uses operating in any other location are prohibited under the ordinance.

In March 1991, Defendants commenced an action against the City in federal court unsuccessfully challenging the constitutionality of Ordinance No. 90-23. See Schneider v. City of Ramsey, 800 F. Supp. 815 (D. Minn. 1992). In their complaint in that action, Defendants admitted that their business violated Ordinance No. 90-23. See Schneider v. City of Ramsey, 800 F. Supp. 815 (D. Minn. 1992). In Holmberg v. City of Ramsey, 12 F. 3d 140 (8th cir. 1993), the Eighth Circuit Court of Appeals upheld the ordinance. The United States Supreme Court denied Defendants' writ of certiorari. 115 S.Ct. 59, 130 L.

Ed. 2d 17, 63 U.S.L.W. 3257 (1994).

In March 1994, Plaintiff commenced this action to permanently enjoin Defendants from operating their business in its present location. On October 10, 1994, Plaintiff moved for summary judgment seeking (1) a declaratory judgment declaring that Defendants' use of the property is a prohibited use under Ordinance No. 90-23 and (2) a permanent injunction prohibiting Defendants from operating an adult bookstore on the property. Defendant contend that since December 30, 1993, (the date on which the Eighth Circuit affirmed Judge Murphy's decision upholding Ordinance No. 90-23), the video booths have been closed to the public and because of this change the subject ordinance is now impermissibly broad and therefore unconstitutional.

On January 20, 1995, the Honorable James A. Morrow issued an Order granting in part and denying in part Plaintiff's motions. Judge Morrow granted Plaintiff's motion for declaratory judgment, declaring that Defendants' use of the property is a prohibited use under Ordinance No. 90-23. In addressing the constitutionality of Ordinance No. 90-23 Judge Morrow followed City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed. 2d 29 (1986) in which the United States supreme Court held that a statute or ordinance regulating adult uses is constitutional if: (the statute or ordinance is a content-neutral time, place, and manner restricting; (2) the government has an important or substantial interest in regulating adult entertainment business which is unrelated to the suppression of free speech; and (3) the incidental restriction on First Amendment freedoms is no greater than essential to further the government's interest. See *Judge Morrow's January 20, 1995 Order, p. 20.*

Judge Morrow held that the City's ordinance is content-neutral but declined to address the remaining issues, namely whether the City had an important or substantial interest in regulating adult uses and whether the ordinance was narrowly tailored, because the studies upon which the City relied were not part of the record. Judge Morrow denied the city's request

for a permanent injunction but invited the City to supplement the record and further stated that if the city could satisfy the remaining two elements, "a permanent injunction should issue." *Judge Morrow's January 20, 1995 Order, paragraph 6.*

The City now has submitted those studies to this Court and requests that this Court rule on the two issues left unanswered by Judge Morrow. This Court must follow the rule of the case as determined by Judge Morrow in his January 20, 1995 Order. Accordingly, this Court's analysis is limited to determining whether the City has satisfied the last two prongs of the City of Renton test: (1) whether the City had a substantial governmental interest in regulating adult entertainment businesses which was unrelated to the suppression of free speech; and (2) whether Ordinance No. 90-23 is sufficiently tailored to affect only that category of businesses shown to produce the unwanted secondary effects.

ANALYSIS

I. THE CITY HAS A SUBSTANTIAL GOVERNMENTAL INTEREST IN REGULATING ADULT USES

The substantial governmental interest asserted by the City is its interest in limiting the adverse secondary effects of adult uses. The eighth Circuit stated that "it is not enough for the city merely to give lip service to a legitimate governmental interest. The City also has the burden to substantiate its declaration that zoning regulations are needed to curb unwanted secondary effects of sexually oriented business that operate in Ramsey." Holmberg v. City of Ramsey, 12 F. 3d 140, 143 (8th cir. 1993). In identifying and measuring the unwanted secondary effects of adult uses, a city may rely upon studies or evidence generated by other cities "so long as [that] evidence...is reasonably believed to be relevant to the problem that the city addresses". ILQ Investments v. City of Rochester, 25 F. 3d 1413 (8th Cir. 1994) citing City of Renton v. Playtime Theaters, 475 U.S. 41, 51 106 S.Ct. 925, 931, 89 L.Ed. 2d 29 (1986).

The city chose to rely on studies conducted by other cities in drafting its zoning ordinance. Judge Morrow stated

that "[t]he problem faced by this Court in that it cannot determine from the record as it has developed thus far whether the studies on which the City relied include adverse secondary effects of adult bookstores without on-premiss consumption". See Judge Morrow's January 20, 1995 Order p. 22. Judge Morrow noted that the case at bar may be distinguishable from ILQ Investments and as such, may require the city to consider studies addressing adverse secondary effects of adult bookstores without on-premises consumption. Accordingly, Judge Morrow declined to rule on the issue but invited the City to supplement the record with the actual studies. following the law of the case as determined by Judge Morrow, this Court must find that if the City relied on studies that are reasonably believed to be relevant to th unwanted secondary effects of adult uses, the City will have met its burden of establishing that there is a substantial governmental interest in regulating adult businesses.

In ILQ the owner of an adult bookstore challenged the constitutionality of the City of rochester's zoning ordinance defining and restricting the location of adult establishment uses. The adult bookstore in ILQ segregated forty percent of its floor space into an adults-only selling area selling sexually explicit books, magazines, and novelty items. The store had no facilities for on-premises viewing of these sexually explicit materials.

The City of Rochester's Common Council directed the Planning commission to study the effects of adult entertainment uses. The Planning Department published the results of its study. This report discussed the relevant legal issues and precedents and summarized studies of the adverse secondary effects of adult entertainment businesses conducted by other cities including Minneapolis, St. Paul, Phoenix and Indianapolis. the Rochester Common Council found that the other cities' studies were relevant to the existing or foreseeable impact which such uses can have. Based upon these studies and a public hearing, the Rochester Common Council adopts its adults uses zoning ordinance.

Plaintiffs in ILQ challenged the bases of the city relied

on in adopting the ordinance. Plaintiffs claimed that because the studies relied on by the city did not specifically address businesses similar to the store at issue, i.e., a bookstore that offers both sexually explicit and non-sexually explicit materials and allows only off-premises consumption of those materials, the city's concern over secondary effects was not legitimate and the ordinance was not narrowly tailored. Id. at 1417. The Eighth Circuit rejected this argument stating:

> The studies the Common Council found relevant to Rochester's problems identified and measured adverse secondary effects linked to adult businesses generally -- higher crime, neighborhood deterioration, lower property values, and an increase in transients -- as well as adverse secondary effects specifically attributable to adult bookstores.
> Id. at 1417-1418.

The instant case is on all fours with ILQ. This Court has reviewed the voluminous studies, reports, reference materials and affidavits submitted by the City. This Court finds that the legislative history of Ordinance No. 90-23 demonstrates that the City has satisfied the second prong of the City of Renton test.

The City retained Northwest Associated Consultants, Inc., to conduct a planning and zoning study of adult uses. In September 1990, the consultants published the results of its study in a report entitled, "*City of Ramsey Adult Use Planning Report*" ("The Planning Report"). The purpose of the study was to determine the primary and secondary effects of adult uses in the City, the appropriate locations of adult uses within the community and the appropriate and harmonious regulation of adult uses and other uses.

In their analysis and evaluation of adult uses, the authors of the Planning Report relied upon two primary categories of resources. The first resource category included several studies, articles, reports and background materials from all over the United states including Minnesota, all of which are

on file with the City Offices.[2] The second resource category included information from the City. Specifically, the May 29, 1990 public hearing conducted by the Ramsey Mayor, City Council, Planning Commission, and staff, the transcript of those proceedings and current Ramsey Police Department complaint records generated in connection with adult use activities within the City.

The Planning Report which contains an extensive analysis of actual and proposed zoning districts designed to provide specific opportunities for adult uses within the City, offered the following conclusions:

1. Activities defined as adult uses are protected by the First Amendment to the United States Constitution.

2. A community must provide reasonable

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[2]The Planning Report identified the following reference materials:
Report of the Attorney General's Working Group on the Regulation of Sexually Oriented Businesses, June 6, 1989.
Rochester/Olmsted Planning Department Adult entertainment Research Report, March 2, 1988. ASPO Planning Advisory Service Report #327: regulating Sex businesses by William Toner, May, 1977
Adult Entertainment Businesses in Indianapolis, an analysis, february 1984.
Relation of Criminal Activity and Adult Businesses; prepared by the City of Phoenix Planning Department May 1979.
American Law of zoning: 17.01; 17.02.
Application of Miller's Test by Jury.
Surveys of X-Rated Pornographic Activity in Dakota County 1986-1989, May 20, 1989.
Law Enforcement Cooperation; National Coalition Against Pornography, Inc.
Pornography Changes Attitudes and Actions, June 1989.
Pornography Destroys; Dallas Association for Decency.
Uncovering Obscene Materials - A Mother's Approach.
Adult Entertainment, Supplement Study, St. Paul Division of Planning, 1988.
Adult Entertainment, 40 Acre Study, St. Paul Division of Planning, 1987.
City of Coon Rapids, City Code-Licenses.
Director's Report, Adult Entertainment, Department of Construction and Land Use, City of Seattle, Washington, August 1989.
City of Renton v. Playtime Theater, Inc., et al
475 U.S. 41 (1986).
City of Minneapolis City Code

opportunity for adult uses to exist. The Renton Washington Supreme Court case provides a guidance in this regard.

3. Adult uses may produce a secondary impact or effect which is judged as negative to the health, safety, and general welfare of the community and as a result, these secondary impacts or effects can be controlled.

4. A community, due to the secondary impact of adult uses, can regulate such activities and restrict their proximity to sensitive activity sites which are typically oriented toward minors.

5. Due also to secondary impacts, a community can maintain the separation of adult uses from one another.

6. A community has the right to police adult uses to insure they are operating in a fashion where the secondary impacts or effects are mitigated to the extent possible.

City of Ramsey Adult Use Planning Report, September 20, 1990, p. 3.

The City relied on the Planning Report, as well as reports from the cites of Rochester, St. Paul, Phoenix, Seattle, and thee ASPO report when it passed Ordinance No. 90-23. This Court notes that most of these studies and reports are the same studies upon which the City of Rochester relied in ILQ.

The City passed its zoning ordinance relying on other cities' studies showing that sexually oriented businesses have an adverse impact on surrounding neighborhoods. When the ordinance was passed, the City Council had reliable evidence before it that businesses like Holmberg's produce undesirable side effects. In the companion federal case, the Eighth Circuit Court of Appeals upheld the District Court's decision concerning the second prong of the City of Renton test: "Because the City reasonably believed the studies were relevant to the problems i Ramsey, City satisfied its burden." Holmberg v. City of Ramsey, 12 F. 3d 140 (8th Cir. 1993) citing Renton, 475 U.S. at 51-52. Thus, the provisions of the ordinance requiring Holmberg to relocate his business represented a legitimate governmental response to a substantial interest.

II. ORDINANCE NO. 90-23 DOES NOT

UNREASONABLY LIMIT ALTERNATIVE AVENUES OF COMMUNICATION

Under the third prong of the third prong of the City of Renton test, the City must demonstrate that Ordinance No. 90-23 is narrowly tailored so as not to unreasonably limit alternative avenues of communication. See Janra Enterprises, Inc. v. City of Reno, 818 F. Supp. 1361 (D. Nev. 1993) and Renton v. Playtime Theatres, Inc., supra. Defendants contend that the City was constitutionality required to disregard the studies upon which it relied in passing Ordinance No. 90-23 because none of those studies evaluated the secondary effects of adult establishments like the Amusement Center, Inc. Defendants' argument is not persuasive.

Again in ILQ the court rejected the store owner's argument that the City of Rochester must disregard the studies used because non evaluated the secondary effects of bookstores offering non-adult as well as adult materials and having no facilities for on-premises consumption by stating: "[t]hat is simply not the law. The requirement of narrow tailoring is satisfied 'so long as the...regulation promotes a substantial government interest that would be achieved less effectively absent the regulation'" Id. at 1418 citing Ward v. Rock Against Racism, 491 U.S. 781, 791, 105 L.Ed. 2d 661 (1989).

Under Ordinance No. 90-23, sexually orientated businesses like Defendants' adult bookstore can locate anywhere within the authorized commercial zones, provided the location is at least 1000 feet from the protected uses. In the City of Renton, the U.S. supreme court stated that the subject ordinance withstood Respondents' First amendment challenge so long as the City refrained from "effectively denying Respondents a reasonable opportunity to open and operate an adult theater within the city." City of Renton, 475 U.s. at 54. This Court holds that because Ordinance No. 90-23 provides defendant with potential relocating sites in accessible commercially zoned areas, the ordinance does not unreasonably

limit alternative avenues of communication.[3]

CONCLUSION

Judge Morrow previously determined that Ordinance No. 90-23 is a valid content-neutral time, place, and manner restriction. This Court now holds that the city has an important or substantial interest in regulating adult entertainment businesses that is unrelated to the suppression of free speech and that the incidental restrictions on First Amendment freedoms is no greater than essential to further the City's interest. The City was reasonable in relying on studies from other cities which addressed the negative "secondary effects" often associated with sexually oriented businesses. In addition, Ordinance No. 20-23 is sufficiently narrowly tailored so as to allow alternative avenues of communication.

Therefore, this Court holds that ordinance No. 90-23 is constitutional and Plaintiff's request for a permanent injunction is hereby granted.

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[3]Defendants contend that the 10 percent restriction in Ordinance 90-23 is overly broad and therefore unconstitutional. This Court notes that the 10 percent restriction in and of itself does not make the ordinance overly broad and unconstitutional. This Court notes that the 10 percent restriction in and of itself does not make the ordinance overly broad and unconstitutional. the 10 percent restriction is simply used to define an adult use. Defendants are not restricted from operating an adult bookstore that has 100% of its inventory in sexual materials as long as it operates such a store within a properly zoned area.

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF ANOKA TENTH JUDICIAL DISTRICT

City of Ramsey,
Plaintiff,

vs. **ORDER**

Larry Holmberg and the
Amusement Center, Inc., a Court File No.
Minnesota Corporation, C9-94-3310
Defendants.

The above-captioned matter came on before the undersigned Judge of District court on October 10, 1994, on Plaintiff's motion for summary judgment. Plaintiff requested (1)a declaratory judgment declaring that Defendants' use of property located at 6710 Highway 10 in the City of Ramsey is a prohibited use under the City's zoning ordinance and (2) a permanent injunction prohibiting defendants from operating an adult bookstore on that property.

Plaintiff was represented by Mr. James J. Thomson, Esq., of Holmes & Graven, Chartered, 470 Pillsbury Center, Minneapolis, Minnesota 55402.

Defendants were represented by Mr. Randall D.B. Tigue, Esq., 2620 Nicollet Avenue, Minneapolis, MN 55408.

The last brief was received on November 3, 1994.

Based upon the arguments and memoranda of counsel and all of the files, records, and proceedings herein, the Court makes the following:

ORDER

1. Plaintiff's motion for summary judgment is GRANTED IN PART and DENIED IN PART.

2. Defendants' use of the property located at 6710 Highway 10 in the city of Ramsey is a prohibited use under the City's zoning ordinance. Plaintiff is entitled to a declaratory judgment and its motion is GRANTED.

3. Defendant Holmberg was evading service of process within the state of Minnesota and Defendants were therefore

properly served by publication in accordance with Minn. R. Civ. P. 4.04(a). Plaintiff's motion is GRANTED in that respect.

4. The zoning ordinance is a content-neutral time, place, and manner regulation. Plaintiff's motion is GRANTED in that respect.

5. Plaintiff is not entitled to have the remainder of its motion granted as there are two genuine issues of material fat left to be resolved. First, whether the zoning ordinance is reasonably believed to be relevant to the problem that the City of Ramsey seeks to address; and second, whether the zoning ordinance is sufficiently narrowly tailored to affect only that category of businesses shown to produce the unwanted secondary effects.

6. Although Plaintiff's motion for a permanent injunction cannot be granted, the issues left for trial are narrowed to the two outlined above in paragraph 5 of this Order. If Plaintiff is able to prove the above two facts, a permanent injunction should issue.

7. The attached memorandum is incorporated into this Order.

8. The Court Administrator shall notify the parties of this Order by mailing copies of the same to the parties' attorneys, whose names and addresses appear on the first page.

BY THE COURT:

/s/

James A. Morrow
Judge of District Court
Tenth Judicial District

Dated: 1/20/95.

MEMORANDUM

FACTS

Defendant Larry Holmberg is the owner of property ("the property") located at 6710 Highway 10 in the City of Ramsey. Since April, 1990, the Amusement Center, Inc., has operated a business on the property consisting of the sale of adults-only books and magazine., the sale of sexual novelties and the in-store display of adults-only motion pictures in video

booths. The video booths are now blocked off from the public. The business is located within 1,000 feet from residentially zoned property, a church, and an on-sale liquor establishment.

On November 13, 1990, the Ramsey City Council enacted Ordinance No. 90-23 which, in part, permanently amended the City Code relating to the zoning and regulation of adult uses. Pursuant to the ordinance, adult uses may operate in the City of Ramsey in B-3 and B-W zoning districts provided that they are at least 1,000 feet from certain uses, including residentially zoned property, churches, and on-sale liquor establishments. Adult uses operating in any other location are prohibited by the Ordinance.

In March, 1991, Defendants commenced an action against the City of Ramsey in the United States District Court for the District of Minnesota. In their complaint in that action, Defendants admitted that their business violated the ordinance, but challenged its constitutionality. Following a trial, the District Court upheld the ordinance. *Schneider v. City of Ramsey*, 800 F. Supp. 815 (D. Minn. 1992). Following an appeal by Defendants, the United States Eighth Circuit Court of Appeals affirmed the District Court. *Holmberg v. City of Ramsey*, 12 F. 3d 140 (8th Cir. 1993). The United States Supreme Court denied defendants' writ of certiorari on October 3, 1994. 115 S.Ct. 59, 130 L.Ed. 17, 63 U.S.L.W. 3257 (1994).

The present action is brought by the City of Ramsey to enforce the provisions of its zoning ordinance.

ANALYSIS

Summary Judgment Standard

Summary judgment is proper only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue of material fact and that either party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03.

The substantive law will identify which facts are "material." A "material fact" is one that will affect the result or outcome of the case, depending on its resolution. *Anderson v.*

Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L.Ed. 2d at 211, 106 S.Ct. at 2510. *See generally,* 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure; Civil 2d* Section 2725, pp. 89-95 (1993).

A "genuine issue" is one that is not futile to try to a fact finder; it cannot be one that is sham, frivolous, or unsubstantial. *Benson v. Northern Gopher Enterprises,* 446 N.W. 2d 678, 680 (Minn. 454, 456, 160 N.W. 2d 153, 155 (1968).

A material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson,* 477 U.S. at 248, 91 L.Ed. 2d at 211-12, 106 s.Ct. at 2510. *See generally, 10A Federal Practice and Procedure; Civil 2d* Section 2725, pp. 95-109.

The standard for granting summary judgment in Minnesota has developed to follow changes taking place in federal law. In *Carlisle v. City of Minneapolis,* 437 N.W. 2d 712 (Minn. Ct. App. 1989), the Minnesota Court of Appeals considered that:

> The United States Supreme Court has stated that the plain language of Rule 56 mandates the entry of summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and in which that party will ear the burden of proof at trial. In such a situation, there can be no 'genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial."

Carlisle, 437 N.W. 2d at 715, quoting *Celotex Corp. v. Carrett,* 477 U.S. 317, 322-23, 91 L.Ed. 2d 265, 273-74, 106 S.Ct. 2548, 2552-53 (1986). If the moving party has sustained its burden of proof and has negated an essential element of the nonmovant's case, the nonmoving party must present affirmative evidence to defeat the properly supported motion. *Carlisle,* 437 N.W. 2d at

715. *See also, Lloyd v. In Home Health, Inc.,* 523 N.W. 2d 2, 3(Minn. Ct. App. 1994) ("Summary judgment on a claim is mandatory against a party who fails to establish an essential element of that claim, if that party has the burden of proof, because this failure renders all other facts immaterial").

The moving party has the burden of proving that there is no genuine issue of material fact. *Vieths v. Thorp Finance Co.,* 305 Minn. 522, 524, 232 N.W. 2d 776, 778 (Minn. 1975). when the moving party makes out a prima facie case, the burden of producing facts that raise a genuine issue shifts to the opposing party. *Thiele v. Stich,* 425 N.W. 2d 580, 583 (Minn. 1988), *citing Celotex Corp.* Summary judgment is proper in Minnesota when the nonmoving party fails to provide the court with specific facts indicating that there is a genuine issue of material fact. *See also, St. Louis County attorney's Office v. Twenty-Four Thousand Six Hundred Forty-Three and 01/100 Dollars ($24,643,01) in Various Denominations of U.S. Currency and Twenty-Four Video Poker* Machines, 524 N.W. 2d 542,___, 1994 Minn. App. LEXIS 1254 *12 (Minn. Ct. App. 1994), *citing Music Land Group, Inc. v. Ceridian Corp.,* 508 N.W. 2d 524, 5[30]31 (Minn. Ct. App. 1993). When the moving party has met its threshold burden, a nonmoving party cannot successfully resist a motion for summary judgment by "simply show[ing] that there is some metaphysical doubt as to material facts." *Carlisle,* 437 N.W. 2d at 715. *See also, Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed. 2d 538, 552 (1986), *cited with approval in Carlisle,* 437 N.W. 2d at 715.

The Court must resolve any doubt regarding whether a fact issue exists or not in favor of finding that a fact issue exists. *Rathbun,* 300 Minn. at 230, 219 N.W. 2d at 646. *See also,* 2A David F. Herr & Roger S. Haydock, *Minnesota Practice Section* 56.03, Author's Comments Section 56.19 (2d ed. 1985). *See further, 10A Federal Practice and Procedure: Civil 2d* Section 2727, pp. 124-25 and 1994 Supplement thereto, at pp. 33-35.

Further, the evidence presented to the Court must be viewed in the light most favorable to the nonmoving party.

Vieths, 305 Minn. at 524-25, 232 N.W. 2d at 778; *Marose v. Hennameyer,* 347 N.W. 2d 509, 511 (Minn. Ct. App. 1984). This means that all doubts and factual inferences must be resolved against the moving party. *Nord v. Herreid,* 305 N.W. 2d 337, 339 Minn. 1991). *See also, 10A Federal Practice and Procedure; Civil 2d* Section 2727, pp. 124-25 *and* 1994 Supplement thereto, at pp. 33-35. However, the United States Supreme Court has made it clear that there is

> no express or implied requirement in [Federal] Rule [of Civil Procedure] that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim. On the contrary, Rule 56(c)[4], which refers to "the affidavits, *if any*" (emphasis added), suggest the absence of such a requirement. And if there were any doubt about the meaning of Rule 56(c)[5] in this regard, such doubt is clearly removed by Rules 56(a)[6] and (b)[7], which provide that claimants and defendants, respectively, may not move for summary judgment *"with or without supporting affidavits"* (emphasis added). The import of these subsections is that, regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatsoever is before the district court demonstrates that the standard for summary

[4]Minn. R. Civ. P. 56.03.

[5]Minn. R. Civ. P. 56.03.

[6]Minn. R. Civ. P. 56.03.

[7]Minn. R. Civ. P. 56.03.

> judgment, as set forth in Rule 56(c)[8], is satisfied. One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose.

Celotex Corp, 477 U.S. at 323-24, 91 L.ed. 2d at 274, 106 S.Ct. at 2553 (emphasis and the words "emphasis added" in original).

Finally, even when the parties do not dispute the facts, but merely the application of the law as to those facts, summary judgment is proper. *Fire & Cas. Ins. Co. of Connecticut v. Illinois Farmers Ins. Co.,* 352 N.W. 2d 798, 799 (Minn. Ct. App. 1994).

Summary Judgment Analysis

Plaintiff argues that there is no genuine issue of material fact concerning the City of Ramsey's entitlement to declaratory judgment and an injunction. Defendants, on the other hand, argue that a genuine issue of material fact exists as to whether Defendants' current operation is an "adult use" as defined in the zoning ordinance. Further, Defendants argue that genuine issues of material fact exist regarding Defendants' affirmative defense. Defendant assert that they were improperly served[9] and that the ordinance is unconstitutional[10] as applied to defendants' current use of the

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[8]Minn. R. Civ. P. 56.03.

[9]Defendant Holmberg is the designated agent for service of process for Defendant the Amusement Center, Inc. Plaintiff's Reply Memorandum in Support of Summary Judgment Motion, at 5. Improper service of process on Defendant Holmberg would be improper service of process on Defendant The Amusement Center, Inc.

[10]Defendants argue that the zoning ordinance is unconstitutional under both the Federal Constitution (First and Fourteenth Amendments to the United States Constitution) and under the Minnesota Constitution (Article I, Section 3 Minnesota Constitution). Minnesota's appellate courts have held that the state constitution's freedom of expression guarantee affords as much

property.

I. Violation of city of Ramsey's Zoning Ordinance

Chapter 9, Section 9.11.19 of the City of ramsey City Code, added by City of Ramsey Ordinance 90-23 in 1990, provides in part as follows:

> Subdivision 1. Purpose. The nature of adult uses is such that they are recognized as having adverse secondary characteristics, particularly when they are accessible to minors and located near residential property or related residential uses such as schools, day care centers, libraries or parks. Furthermore, the concentration of adult uses has an adverse effect upon the use and enjoyment of adjacent areas. The nature of adult uses requires that they not be allowed within certain zoning districts, or within minimum distances from each other or residential uses. Special regulation of adult uses is necessary to ensure that the adverse secondary effects would not contribute or enhance criminal activity in the area of such uses nor will it contribute to the blighting or downgrading of the surrounding property and lessening of its value.
>
> Subd. 2. General. Adult uses as defined in this Chapter shall be subject to the following general provisions:
>
> a. Activities classified as obscene are not

protection as the First Amendment, *Knudtson v. City of Coates,* 506 N.W. 2d 29, 32 (Minn. Ct. App. 1993), *reversed on other grounds,* 519 N.W. 2d 166 (Minn. 1994), and the liberties have been interpreted for some purposes more broad under the state than under the Federal Constitution. *State v. Davidson,* 481 N.W. 2d 51, 56 (Minn. 1992). For the issue at bar, however, the parties have not identified any ways in which the protections of the federal and state Constitutions vary.

permitted and are prohibited.

b. Adult uses, either principal or accessory, shall be prohibited from locating in any building which is also utilized for residential purposes.

c. Adult uses, either principal or accessory, shall be prohibited from locating in any place which is also used to dispense or consume alcoholic beverages.

d. An adult use which does not qualify as an accessory use pursuant to Subdivision 4a. of this subsection, shall be classified as an adult use-principal.

Subd. 3. Adult Uses-Principal *[sic]:*

a. Adult use-principle shall be located at least 1,000 radial feet, as measured in a straight line from the closest point of the property line of the building upon which the adult use-principal is locate to the property line of:

1. Residentially zoned property,

2. A licensed day care center,

3. A public or private educational facility classified as an elementary, junior high or senior high,

4. A public library,

5. A public park,

6. Another adult use-principal [sic],

7. An on-sale liquor establishment, or

8. Any church or church related organization.

b. Adult use principal activities, as defined by this Chapter, shall be classified as one use. No two adult uses-principal shall be located in the same building or upon the same property and each use shall be subject to this Section.

c. . . .

d. . . .

Subd. 4. Adult Uses - Accessory [sic]:

a. Adult use-accessory shall:

1. Comprise no more than 10% of the floor area of the establishment in which it is located.

2. Comprise no more than 20% of the gross receipts of the entire business operation.

3. Not involve or include any activity except the sale or rental of merchandise.

b. ...

1. ...

2. ...

3. ...

c. ...

Subd. 5. Nonconforming Adult Use - Principal [*sic*] or Accessory:...

Chapter 9, Section 9.02 of the City of Ramsey City Code, amended by City of Ramsey Ordinance 90-23 in 1990, is the definitions section of the City Code. It provided in part as follows:

> Adult Uses: Adult uses include adult bookstores, adult motion picture theaters, adult motion picture rentals, adult mini-motion picture theaters, adult massage parlors, adult steam room/bathhouse/sauna facilities, adult companionship establishments, adult rap/conversation parlors, adult health/sport clubs, adult cabarets, adult novelty businesses, adult motion picture arcades, adult modeling studios, adult hotels/motels, adult body painting studios, and other premises, enterprises, establishments, businesses or places open to some or all members of the public, at or in which there is an emphasis on the presentation, display, depiction or description of "specified sexual activities" or "specified anatomical areas" which are capable of being seen by members of

the public.

a. Specified anatomical areas:
   1. ...
   2. ...

b. Specified Sexual Activities:
   1. ...
   2. ...
   3. ...
   4. ...
   5. ...
   6. ...
   7. ...

Adult Uses - Accessory [*sic*]: A use, business, or establishment having 10% or less of its stock in grade or floor area allocated to, or 20% or less of its gross receipts derived from movie rentals or magazine sales.

Adult Uses - Principal [*sic*]: A use, business, or establishment having more than 10% of its stock in trade or floor area allocated to, or more than 20% of its gross receipts derived from, any adult use.

Adult Use Body Painting Studio...

Adult Use - Bookstore [*sic*]. A building or portion of a building used for the barter, rental or sale of items consisting of printed matter, pictures, slides, records, audio tape, videotape, or motion picture film if such building or portion of a building is not open to the public generally but only to one or more classes of the public excluding [*sic*] any minor by reason of age or if a substantial or significant portion of such items are distinguished or characterized by an emphasis on the depiction or description of "specified sexual activities" or "specified anatomical areas".

> Adult Use - Motion Picture Arcade [*sic*]. Any place to which the public is permitted or invited wherein coin or slug-operated or electronically, electrically or mechanically controlled or operated still or motion picture machines, projectors or other image producing devices are maintained to show image to five or fewer persons per machine at any one time, and where the images so displayed are distinguished or characterized by an emphasis on depicting or describing "specified sexual activities" or "specified anatomical areas."
>
> Adult Use - Novelty Business [*sic*]. A business which has as a principal activity the sale of devices which stimulate human genitals or devices which are designed for sexual stimulation.

Plaintiff argues that the facts are undisputed and that Defendants are violating the City's zoning ordinance. Defendants argue that they have admitted certain allegations contained in the City's complaint, but that "the allegations expressly not admitted are that Defendants operate an adult use as defined by the ordinance on the property, and that the Defendants' current us is expressly prohibited by the ordinance." Memorandum of Points and authorities in Opposition to Plaintiff's Motion for Summary Judgment, at 4-5. Defendants further argue that

> No affidavits of any kind are submitted describing Defendants' current use or which would lead the court to determine that the current use falls within the purview of the ordinance. By contrast, defendant in his

> affidavit, sets forth the fact that since the time of the Eighth Circuit decision, substantial changes have been made to the nature of the operation, including elimination of the on-premiss viewing of adults-only material, and a change in merchandise, to eliminate much of the sexually explicit material, and to substitute novelty items, making the store similar in nature to the 'Fantasy House' [*sic*} establishment in Fridley.

Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment, at 5. Defendants subsequently "request that the motion for summary judgment be denied." Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment, at 5.

It is clear from the summary judgment standard as set out above on page 5 of this memorandum that Plaintiff is not required to submit affidavits in support of its motion. *See Celotex Corp.*, 477 U.S. at 323-24, 91 L.Rd. 2d at 274, 106 S.Ct. at 2553. However, the Court has before it three affidavits regarding the content of the premises. All three affidavits were executed after Defendants' memorandum of law in opposition to the motion for summary judgment was submitted to the Court. Two of the affidavits were submitted in support of the motion for summary judgment and one was submitted in opposition to the motion. The first affidavit is from Mr. Michael Auspos, the Police Chef for the City of Ramsey. He states in part:

> 1. I am the Police Chief for the City of Ramsey, Minnesota. On October 5, 1994, I entered the adult bookstore located at 6710 Highway 10 in the City. Attached to this affidavit are pictures of the property as it existed on October 5, 1994. A sign on the property depicts the business as an "adult bookstore."

2. I entered the building through the front door, which was open. I walked into the display area of the building. Along the east wall of this area were magazine racks containing a few comic books and other types of non-adult magazines. [Emphasis added]. Other racks contained sexual artifacts and novelties. On the other racks towards the west portion of the room there were numerous pornographic magazines, which were in a plastic wrap and sealed. Along the west wall display area were video cassettes of a pornographic nature.

The second affidavit is from Mr. James Singewald. It provides, in part:

l.I am a police officer for the City of Ramsey. On Wednesday, October 5, 1994 shortly after 11:00 a.m., I entered the premises at 6710 Highway 10 in the City of Ramsey, along with Police Chief auspos.

2. As I entered the building, there was a male sitting behind the counter at the front door. I walked into the portion of the building displaying the sexual novelties, adult books and magazines. In the magazines area, I observed some sports magazines and comic books in addition to the magazines containing sexually-explicit material. *The portion of the display area that contained the non-sexually explicit magazines was less than 10%* [Emphasis added].

3. ...

4. ...

5. As I was leaving the business, I observed along the sidewalk adjacent to the building two discarded and unrolled condoms.

The third affidavit is from Ms. Camille Nelson. It provides:

> 1. Your affiant is employed as a clerk at the Amusement Center Bookstore, located at 6710 Highway 10, Ramsey, Minnesota.
> 2. As such your affiant has had occasion to observe the new floor layout at the Amusement Center.
> 3. Under the new layout, the video tape viewing booths are physically blocked off, and we are under instructions to admit no one into the area of the store.
> 4. In addition, all of the video tape viewing booths have been disconnected from electric power so they are totally non-functional.
> 5. Of the remaining floor space, only *40 percent is devoted to material of a sexually explicit nature, either books, magazines, video tapes, or novelties.* [Emphasis added].
> 6. The remaining 60% of the floor space in the store is devoted to items such [sic] motorcycle magazines, car magazines, hunting magazines, and Popular Mechanics types of magazines.
> 7. Your affiant executes this affidavit in opposition to Plaintiff's Motion for Summary Judgment.

Although the affidavits vary in the percentage of the floor space used to display sexually explicit materials between 90% and 40%, it is undisputed that in excess of 10% of the floor space is dedicated to adult use materials, either books, magazines, video tapes, or novelties. As set out above, the zoning ordinance provides that "[a] use, business, or establishment having more than 10% of its stock in trade or floor area allocated to, or more than 20% of its gross receipts derived from, any adult use" is an adult use-principal. Section 9.02 City of Ramsey City Code. The dispute is not over

material[11] facts, but over the legal consequences of those facts. As discussed above, when not the facts, but rather the application of the law to those facts, is disputed, summary judgment is proper. *See Fire & Cas. Ins. Co. of Connecticut v. Illinois Farmers Ins. Co.,* 352 N.W. 2d at 799, cited *supra* pages 5-6 of the memorandum.

The application of the clear language of the zoning ordinance to the facts shows that the Defendants operate an "adult use-principal." Because Defendants do not otherwise dispute that they are in violation of the provisions of the ordinance, Plaintiff is entitled to its declaratory judgment.

As Plaintiff has set out in its memorandum of law in support of its motion, violations of zoning ordinances constitute irreparable injury and are appropriate for injunctive relief. In the adult use case of *City of Minneapolis v. F & R, Inc.,* 300 N.W. 2d 2 (Minn. 1980), *reh. denied (Minn. Jan. 1, 1981), the Supreme Court emphasized that it has recognized that an injunction is probably the most efficient way for local governmental unit to deal with continuing zoning violations. F & R, Inc.,* at 4, *citing City of Mahtomedi v. Spychalla,* 308 Minn. 429, 432, 243 N.W. 2d 31, 33 (1976); *Itasca County v. Rodenz,* 268 N.w. 2d 423, 424 (Minn. 1978); and *Brown County v. Meidinger,* 271 N.w. 2d 15, 19 (S.D. 1978). Compared to injunctive relief, repeated prosecution for a violation of a zoning ordinance, seeking imposition of a fine or jail term, is an inadequate method of attaining the goal of zoning ordinance compliance. The purpose of use restrictions is not punishment but the attainment of conforming uses. An injunction ordering compliance with use restrictions is peculiarly suited to this end. Furthermore, repeated prosecution for each violation is a

[11]The difference in facts is not material, because a finding either way does not affect the result or outcome of the case, since either way the percentage of floor space dedicated to sexually explicit materials excess 10%. *See Anderson v. Liberty Lobby, Inc.,* 477 U.. at 248. 91 L.Ed. 2d at 211, 106 S.Ct. at 2510. *See further,* cases cited in the summary standard as set out above on page 2 of this memorandum.

misuse of limited administrative and judicial resources. *F & R, Inc.*, at 4.

It is therefore necessary to review defendants' affirmative defenses....

III. The Constitutionality of the Zoning Ordinance

Defendants previously unsuccessfully challenged the constitutionality of the zoning ordinance in federal court. *See Schneider v. City of Ramsey,* 800 F. supp. 815 (D. Minn. 1992), *aff'd sub nom. Holmberg v. City of Ramsey,* 12 F. 3d 140 (8th Cir. 1993), *cert. denied,* 115 S.Ct. 59, 130 L.ed. 2d 17, 63 U.S.L.W. 3257 (1994). The question is therefore whether defendants should be allowed to raise the constitutional issue again.

Although not in so many words, Plaintiff has contested defendants' ability to challenge the constitutionality of the zoning ordinance under the principles of res judicata or collateral estoppel. Defendants assert that the elements of neither principle are met.

Res judicata and collateral estoppel are two different but related doctrines. *See Gulbranson v. Gulbranson,* 408 N.W. 2d 216, 217 (Minn. Ct. App. 1987). Res judicata bars claims, while collateral estoppel bars issues. Res judicata is applied when a party does not presented the whole of the claim in the original suit. Collateral estoppel is applied when the claim in the second suit is different from that involved in the first, but involves one or more issues that were actually litigated and necessarily determined in the original action. Res judicata prevents further litigation of issues that were not in fact litigated so long as they were part of the same claim. Collateral estoppel, on the other hand, deals only with the effect of the judgment on issues actually litigated and necessarily determined in the prior suit. 3 Douglas D. McFarland, William J. Keppel, *Minnesota Civil Practice* (2nd ed. 1990) Section 2532, at 623.

Res judicata operates as an absolute bar to a subsequent suit on the same cause of action, concluding the parties and their privies not only as to every matter that was litigated, but also as to any other claim or defense which might

have been litigated. *R.W. v T.F.,* 510 N.W. 2d 231, 234-35 (Minn. Ct. App. 1994), *rev. granted* (Minn. 1994). *See also, Dorso Trailer Sales, Inc. v. American Body* and Trailer Inc., 482 N.W. 2d 771, 773-74 (Minn. 1992).

When a prior judgment is offered as a bar to a later suit on a different claim, the question is simply whether any issue has been adjudicated by the judgment that is also present in the second suit. If it has, the judgment is conclusive on that issue and cannot be contradicted in the second action. The issue must be identical to the one in the prior suit. If the issue was not involved in the prior adjudication thereof on the merits, the judgment can have no effect in the later action. 3 *Minnesota Civil Practice Section* 2538, at 648-49. Collateral estoppel is appropriately applied where (1) the issue at hand is identical to an issue in the prior adjudication, (2) there was a final judgment on the merits, (3) the party to be estopped was a party or in privity with a party to the prior adjudication, and (4) the estopped party was given a full and fair opportunity to litigate the adjudicated issue. *Saint Paul Fire and Marine Ins. Co. v. Central Nat'l, Ins. Co. of Omaha,* 480 N.W. 2d 608, 613 (Minn. 1988). *See also, 3 Minnesota Civil Practice* Section 2538, at 650-51.

Defendants assert in their joint answer that Plaintiff is barred by res judicata from bringing this action. They claim that Plaintiff should have brought the action as a compulsory counterclaim in federal court. This assertion is incorrect. zoning ordinance violations are continuing in nature and a party need not assert a counterclaim based on facts which occur after the party serves its answer. *Cochrane v. Iowa Beef Processors, Inc.,* 596 F. 2d 254, 264, fn. 9 (8th Cir. 1979), *cert. denied* 442 U.S. 921, 99 S.Ct. 2848, 61 L.Ed. 2d 290 (1979). *See also, 6 Federal Practice and Procedure; Civil 2d Section* 1411, at 79-81 (1990). Plaintiff is correct that it may bring an action for an injunction at any time in such situations and that it is not barred by res judicata from bringing this action.

In the federal action, Defendants in this action brought suit against the city alleging its zoning ordinance violated their

rights under the First and Fourteenth Amendments of the United States Constitution. Defendant The Amusement Center, Inc.'s business at that time consisted of the sale of adults only books and magazines, the sale of sexual novelties, and coin-operated picture viewing machines for viewing adults only motion pictures on the premises. *Schneider,* 800 F. Supp. at 817-18. Judge Murphy upheld the ordinance. After the Eighth Circuit Court of appeals affirmed Judge Murphy's decision on December 30, 1993, the video booths were closed to the public. Defendants now allege that since the business has changed, the ordinance is overly broad and therefore unconstitutional. Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment, at 11.

The United States Supreme Court has established a three-part analysis to determine whether a statue or ordinance regulating adult entertainment business is constitutional. *City of Renton v. Playtime Theaters, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed. 29 (1986); *Young v. American Mini Theaters,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed. 2d 319 (1976). First, a court must determine whether the statute or ordinance is content-neutral time, place, and manner restriction. Then, a court must determine whether the government has an important or substantial interest in regulating adult entertainment business which is unrelated to the suppression of free speech. and finally, a court must determine whether the incidental restriction on First Amendment freedoms is no greater than essential to further the government's interest. *Janra Enterprises, Inc. v. City of Reno,* 818 F. Supp. 1361 (D. Nev. 1993), *citing Tollis, Inc. v. San Bernardino County,* 827 F. 2d 1329, 1331 (9th Cir. 1987). *See also Renton,* 475 U.S. at 47, 106 S.Ct. at 928. *See further, Alexander v. City of Minneapolis,* 928 F. 2d 278, 282-284 (8th cir. 1991), *reh. denied,* 1991 U.S. App. LEXIS 12080 (8th Cir. 1991) *and ILQ Investments v. City of Rochester,* 25 F. 3d 1413, 1416 (8th Cir. 1994), *cert. denied,* 115 S.Ct. 578, 130 L.Ed. 2d 493, 63 U.S.L.W. 3420 (1994).

In her findings, Judge Murphy held that "[t]here is no indication that the stated purpose of the ordinance was a

pretext masking a true purpose to restrain Plaintiffs' [now Defendants'] speech on the basis of its content" and "there is no direct evidence that the City intended to limit the content of Plaintiff's [now Defendants'] speech, nor is there indirect evidence from which any such intent may be inferred." *Schneider,* 800 F. Sup. at 821-22. The Eighth Circuit held that "[b]ecause the City's zoning ordinance limits the location of sexually oriented businesses rather than banning them altogether, the ordinance is analyzed as a form of time, place, and manner regulation of protected speech." *Holmberg,* 12 F. 3d at 143, *citing Renton,* 475 U.S. at 46, 106 S.Ct. at 928.

Under the collateral estoppel doctrine, this Court must accept the first part of the three party analysis as determined and Defendants cannot challenge it again.

The substantial governmental interest alleged in this case is the City of Ramsey's interest in limiting adverse secondary effects of adult uses. As the Eighth Circuit pointed out, the City cannot merely give lip service to a legitimate governmental interest, but has the burden to substantiate its declaration that zoning regulations are needed to curb unwanted secondary effects of sexually oriented businesses that operate in ramsey. *Holmberg,* 12 F. 3d at 143. The City can establish its interest either by showing actual adverse secondary effects or in the alternative can under Renton rely on the experiences of other cities in enacting its adult zoning ordinances. Id. The First Amendment does not require a city to conduct new studies or produce new evidence independent of that already generated by other cities, so long as whatever evidence the city relies on is reasonably believed to be relevant to the problem that the city addresses. *Renton,* 475 U.S. at 51-52, 106 S.Ct. at 931. Judge Murphy found that there is no indication that the city planner's study was "anything but a thorough, professional inquiry into evidence reasonably believed to be relevant to the problem the city was addressing. The findings adopted by the City incorporate conclusions from this study and express a substantial governmental interest." *Schneider,* 800 F. Supp. at 822. Judge Murphy also addressed

the argument that the lack of post-enactment adverse secondary effects in the city undermines reasonable reliance on the city planner's study. She rejected the argument based on *International Eateries of America, Inc. v. Broward County,* 941 F. 2d 1157, 1163 (11th Cir. 1991), *cert. denied,* 112 S. Ct. 1294, 117 L.Ed. 2d 517 (1992). *Schneider,* 800 F. Supp. at 822, fn. 4.

The problem faced by this Court is that it cannot determine from the record as it has developed thus far whether the studies on which the City relied include adverse secondary effects of adult bookstores without on-premises consumption.[12] However, the uncontested affidavit of Mr. Robert McLaughlin suggests that:

> 5. All of the adult entertainment studies relied upon by any municipality have uniformly been of adults-only theaters; adults-only bookstores, which have consisted of virtually 100 percent sexually explicit material and featuring on-premises consumption of said material through coin-operated "peep shows"; and alcoholic and non-alcoholic bars featuring live nude dancing.

McLaughlin Affidavit at 2 (emphasis added).

The question is whether the studies' evidence from the other cities is reasonably believed to be relevant to the problem that the City of Ramsey seeks to address and whether the ordinance is sufficiently narrowly tailored to affect only that category of businesses shown to produce the unwanted secondary effects. *See World Wide Video v. City of Tukwila,* 816

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[12]In this respect the case at bar may be different from *ILQ Investments v. City of Rochester,* 25 F. 3d 1413 (8th Cir. 1994), *cert. denied,* 115 S.Ct. 578, 130 L.Ed. 2d 493, 63 U.S.L.W. 3420 (1994). There the Eighth Circuit Court of Appeals held that the studies relied on by Rochester's Common Counsel identified and measured adverse secondary effects linked to adult businesses generally as well as adverse secondary effects specifically attributable to adult bookstores. *ILQ Investments,* at 1417-18. In the case at bar, however, this Court has no evidence whatsoever regarding the content of the studies that the City of Ramsey relied upon.

P.2d 18, 21 (Wash. 1991), *cert denied* 112 S.Ct. 1672, 118 L.Ed. 2d 391 (1992). *See also Schad v. Mount Ephraim,* 452 U.S. 61, 68 L.Ed. 671, 101 S.Ct. 2176 (1981) *and Erznoznik v. City of Jacksonville,* 422 U.S. 205, 45 L.Ed. 2d 125, 95 S.Ct. 2268 (1975). This question may have been addressed by the federal court or if it was not, the federal court might have been able to address it. However, there is nothing in the record for the Court's review that suggests either. Rather, because defendants challenged the zoning ordinance from the position of an adult bookstore with on-premises consumption of adults only materials and because the studies apparently showed that other cities have experienced adverse secondary effects from adult bookstores with on-premises consumption of adults only material, it seems that defendants would have been precluded from raising the overbreadth of the provisions as a constitutional challenge to the ordinance, since they clearly fell within the core of the zoning ordinance provision. *See Young,* 427 U.S. at 59-60, 106 S.Ct. at 2447, 49 L.Ed. 2d at 319-320. Judge Murphy appropriately held so when Defendants attempted to challenge the adult use accessory provisions of the ordinance. *Schneider,* 800 F. Supp. at 822, fn. 3.

Whether the studies relied on by the City of Ramsey before enacting the zoning ordinance address the adverse secondary effects of adult bookstores without on-premises consumption of adults only material and whether the ordinance is sufficiently narrowly drafted to correspond with the studies' findings are disputed issues of material fact. These two issues must therefore be reserved for trial and Plaintiff's motion for summary judgment and permanent injunction must be denied.

CONCLUSION

Defendants' use of the property located at 6710 Highway 10 in the City of Ramsey is a prohibited use under the City's zoning ordinance and Plaintiff is entitled to a declaratory judgment to that effect. further, Defendants first affirmative defense, that the zoning ordinance is unconstitutional, can only be rejected in part. the ordinance is a valid time, place, and manner regulation, but the court cannot determine on the

record as it has developed thus far whether the studies relied on by the City of Ramsey before enacting the zoning ordinance address the adverse secondary effects of adult bookstores without on-premises consumption of adults only material and whether the ordinance is sufficiently narrowly drafted to correspond with the studies' findings. Plaintiff is therefore not entitled to a permanent injunction at this stage of the proceedings.

J.A.M.

ORDINANCE NO. 90-23
CITY OF RAMSEY
ANOKA COUNTY, MINNESOTA

AN ORDINANCE AMENDING CHAPTER 9 OF THE CITY CODE OF THE CITY OF RAMSEY RELATING TO THE RULES OF CONSTRUCTION AND INTERPRETATION; THE DEFINITION OF ADULT USES, AMORTIZATION, NONCONFORMING USE AND NONCONFORMING STRUCTURE; PROCESSING COSTS; THE PROCEDURAL REQUIREMENTS FOR CONDITIONAL USE PERMITS AND VARIANCES; THE PROCEDURAL REQUIREMENTS AND MEMBERSHIP OF THE BOARD OF ADJUSTMENT AND APPEALS; PROCESSING COSTS FOR CONDITIONAL USE PERMITS AND VARIANCES; THE REGULATION OF NON-CONFORMING BUILDINGS, STRUCTURES AND USES; PERFORMANCE STANDARDS FOR ADULT USES; THE REVISION OF ACTIVITIES WITHIN THE B-1, B-2, RB, I AND RI ZONING DISTRICTS; PERFORMANCE STANDARDS FOR NON-RESIDENTIAL USE; THE REPEAL OF DUPLICATE REFERENCES IN ALL ZONING DISTRICTS; THE CREATION OF THE B-3 HIGHWAY BUSINESS DISTRICT AND THE B-W, BUSINESS/WAREHOUSING DISTRICT, AND THE REZONING OF CERTAIN LANDS TO BE-W AND B-3 ZONING DISTRICTS.

The City of Ramsey ordains:

Section 1. Amendment. That Chapter 9, Section 9.01.06 Rules shall be amended to read as follows:

9.01.06 Rules of construction and interpretation

Subdivision 1. Conflicting conditions. Where the conditions imposed by any provision of this Chapter are either more or less restrictive than comparable conditions by another provision of this Chapter or by other Chapters of the City Code, rule or registration of the city, the provision which imposes the more restrictive condition, standard, or requirement shall prevail.

Subd. 2. Language rules of construction. The language set forth in the text of this chapter shall be interpreted in accordance with the following rules of construction:

a. The singular number includes the plural, and the plural the singular.

b. The present tense includes the past and future tenses, and the future the present.

c. The word "shall" is mandatory while the word "may" is permissive.

d. The masculine gender includes the feminine and neuter.

e. Whenever a word or term defined hereinafter appears in the text of this chapter, its meaning shall be construed as set forth in the Definitions section of this chapter.

f. All measured distances expressed in feet shall be the nearest tent of a foot.

Section 2. Amendment. That Chapter 9, Section 9.02 Definitions of the City Code shall be amended to add the following definitions:

Adult Uses; Adult uses include adult bookstores, adult motion picture theaters, adult motion rental, adult mini-motion picture theaters, adult massage parlors, adult stream room/bathhouse/sauna facilities, adult companionship establishments, adult rap/conversation parlors, adult

health/sport clubs, adult cabarets, adult novelty businesses, adult motion picture arcades, adult modeling studios, adult hotels/motels, adult body painting studios, and other premises, enterprises, establishments, businesses or places open to some or all members of the public, at or in which there is an emphasis on the presentation, display, depiction or description of "specified sexual activities" or "specified anatomical areas" which are capable of being seen by members of the public.

a. Specified Anatomical Areas:

1. Less than completely and opaquely covered human genitals, pubic region, buttock, anus, or female breast(s) below a point immediately above the top of the areola; and

2. human male genitals in a discernibly turgid state, even if completely and opaquely covered.

b. Specified Sexual activities:

1. Actual or simulated sexual intercourse, oral copulation, anal intercourse, oral -anal copulation, bestiality, direct physical stimulation of unclothed genitals, flagellation or torture in the context of a sexual relationship, or the use of excretory functions in the context of a sexual relationship, and any of the following sexually-oriented acts or conduct: anilingus, buggery, coprophagy, coprophilia, cunnilingus, fellatio, necrophilia, pederasty, pedophilia, piquerism, sapphism, zooerasty; or

2. Clearly depicted human genitals in the state of sexual stimulation, arousal or tumescence; or

3. Use of human or animal ejaculation, sodomy, oral copulation, coitus, or masturbation; or

4. fondling or touching of nude human genitalia, pubic region, buttocks, or female breast; or

5. Situations involving a person or persons, any of whom are nude, clad in undergarments or in sexually revealing costumer, and who are engaged in activities involving the flagellation, torture, fettering, binding or other physical restraint of any such persons; or

6. Erotic or lewd touching, fondling or other sexually-oriented contact with an animal by a human being; or

7. Human excretion, urination, menstruation, vaginal or anal irrigation.

Adult Uses - Accessory: A use, business, or establishment having 10% or less of its stock in trade or floor area allocated to, or 20% or less of its gross receipts derived from movie rentals or magazines sales.

Adult Uses - Principal: A use, business establishment having more than 10% of its stock in trade or floor area allocated to, or more than 20% of its gross receipts derived from, any adult use.

Adult Use Body Painting Studio. An establishment or business which provides the service of applying paint or other substance, whether transparent, to or on the body of a patron when such body is wholly or partially nude in terms of "specified anatomical areas".

Adult Use - Bookstore. A building or portion of a building used for the barter, rental or sale of items consisting of printed matter, pictures, slides, records,audio tape, videotape, or motion picture film if such building or portion of a building is not open to the public generally but only to one or more classes of the public extending any minor by reason of age or if a

substantial or significant portion of such items are distinguished or characterized by an emphasis on the depiction or description of "specified sexual activities" or "specified anatomical areas".

Adult Use - Cabaret. A building or portion of a building used for providing dancing or other live entertainment is distinguished or characterized by an emphasis on the presence, display, depiction or description of "specified sexual activities" or "specified anatomical areas".

Adult Use Companionship Establishment. A companionship establishment which excludes minors by reason of age, or which provides the service of engaging in or listening to conversation, talk or discission between an employee of the establishment and a customer, if such service is distinguished or characterized by an emphasis on "specified sexual activities" or "specified anatomical areas".

Adult Use Conversation/Rap Parlor. A conversation/rap parlor which excludes minors by reason of age, or which provides the service of engaging in or listening to conversation, talk, or discussion, if such service is distinguished or characterized by an emphasis on "specified sexual activities" or "specified anatomical areas".

Adult Use - Health/Sport Club. A health/sport club which excludes minors by reason of age, or if such club is distinguished or characterized by an emphasis on "specified sexual activities" or "specified anatomical areas".

Adult Use - Hotel or Motel. Adult Hotel or motel means a hotel or motel from which minors are specifically excluded from patronage and wherein material is presented which id distinguished or characterized by an

emphasis on matter depicting, describing or relating to "specified sexually activities" or "specified anatomical areas".

Adult Use Massage Parlor, Health Club. A massage parlor or health club which restricts minors by reason of age, and which provides the services of massage, if such service is distinguished or characterized by an emphasis on "specified sexual activities" or "specified anatomical areas".

Adult Use Mini-Motion Picture Theater. A building or portion of a building with a capacity for less than 50 persons used for presenting material if such building or portion of a building as a prevailing practice excludes minors by virtue of age, or if such material is distinguished or characterized by an emphasis on "specified sexual activities" or "specified anatomical areas" for observation by patrons therein.

Adult Use - Modeling Studio. An establishment whose major business is the provision to customers, of figure models who are so provided with the intent of providing sexual stimulation or sexual gratification to such customers and who engage in "specified sexual activities" or display "specified anatomical areas" while being observed, painted, painted upon, sketched, drawn, sculptured, photographed, or otherwise depicted by such customers.

Adult Use - Motion Picture Arcade. Any place to which the public is permitted or invited wherein coin or slug-operated or electronically, electrically or mechanically controlled or operated still or motor picture machines, projectors or other image-producing devices are maintained to show images to five or fewer persons per machine at any one time, and

where the images so displayed are distinguished or characterized by an emphasis on depicting or describing 'specified sexual activities" or "specified anatomical areas".

Adult Use - Motion Picture Theater. A building or portion of a building with a capacity of 50 or more person used for presenting material if such building or portion of a building as a prevailing practice excludes minors by virtue of age or if such material is distinguished or characterized by an emphasis on "specified sexual activities" or "specified anatomical areas" for observation by patrons therein.

Adult Use - Novelty Business. A business which has a principal activity the sale of device which stimulate human genitals or devices which are designed for sexual stimulation.

Adult Use - Sauna. A sauna which excludes minors by reason of age, or which provides a steam bath or heat bathing room used for the purpose of bathing, relaxation, or reducing, utilizing steam or hot air as a cleaning, relaxing or reducing agent, if the service provided by the sauna is distinguished or characterized by an emphasis on "specified sexual activities" or "specified anatomical areas".

Adult Use steam Room/Bathhouse Facility. A building or portion of a building used for providing a steam bath or heat bathing room used for the purpose of pleasure, bathing, relaxation, or reducing, utilizing steam or hot air as a cleaning, relaxing or reducing agent if such building or portion of a building restricts minors by reason of age if the service provided by the steam room/bathhouse facility is

distinguished or characterized by an emphasis on "specified sexual activities" or "specified anatomical areas".

Amortization: The establishment of a time schedule over which the cost of an investment is depreciated.

Nonconforming structure: A building or structure which is a Nonconforming use as defined in this section.

Nonconforming use: a building, structure, premises, or use which does not comply or conform with the applicable conditions or provisions of this Chapter.

a. Nonconforming use - Illegal; A building, structure, premise, or use which at the time of its establishment did not comply or conform with the applicable conditions or provisions of the City Code which were in effect at such date, and which continues such noncompliance and nonconformance with the City Code.

b. Nonconforming use - Legal: A building, structure, premises, or use which at the time of its establishment was in compliance and conformance with the applicable conditions and provisions of the City Code which were in effect at such date, but which does not now comply or conform to conditions and provisions of the current City Code.

AMENDMENT I.

Freedom of religion, speech and press; peaceful assemblage; petition of grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

Section 1. Citizenship rights not be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction an equal protection of the laws.

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF ANOKA TENTH JUDICIAL DISTRICT
CASE TYPE: DECLARATORY JUDGMENT

The City of Ramsey,

Plaintiff,

vs.

Larry Holmberg and the Amusement Center, Inc., a Minnesota corporation,

Defendants.

JOINT ANSWER OF DEFENDANTS

Court File No. C9-94-3310

The above-named Defendants for their joint answer, hereby alleged the following:

FIRST DEFENSE

1. Except as hereinafter admitted or qualified, defendants deny each and every allegation of plaintiff's complaint.

2. Defendants admit the allegations contained in paragraphs 1, 2, 3, and 4 of plaintiff's complaint.

3. With respect to paragraph, Defendants admit that the business has been in operation, since April of 1990, that adults-only material are sold and displayed therein, that they are located within one thousand feet of residentially zoned property, a church, and an on sale liquor establishment. defendants further admit that they have not sought nor been granted an extension of the deadline contain in ordinance number 90-234. Defendants put Plaintiff to its strict proof of the remaining allegations of paragraph 5.

4. With respect to paragraph 6 if the cnokaubtm defendants admit having commenced the action in United States District Court and that the District court upheld the validity of the ordinance. Defendants affirmatively allege that they are seeking review of said decision before the United States Supreme Court.

5. Defendants specifically deny the allegations contained in paragraphs 7 and l0 of the complaint.

6. Defendants assert that paragraphs 8 and 9 are legal conclusions not subject to responsive pleading.

SECOND DEFENSE

7. Defendants allege that there has been an insufficiency of service of process in this matter.

THIRD DEFENSE

8. Plaintiff's cause of action is barred by res judicata, by virtue of its failure to assert it as a compulsory counterclaim in the federal action alleged in paragraph 6 of Plaintiff's complaint.

FOURTH DEFENSE

9. Ramsey City Ordinance No. 9-23 is unconstitutional as applied to Defendant's current establishment, under the 1 and 14 Amendments to the United States Constitution, and Article 1, Section 3 o the Minnesota Constitution.

FIFTH DEFENSE

l0. This Court should defer action in the above-entitled matter pending United States Supreme Court Review of the ordinance of the federal action.

WHEREFORE, Defendants request the judgment and decree of this Court as follows:

a. That Plaintiff take nothing by its pretended cause of action, and that its complaint against defendants be dismissed with prejudice.

b. That defendants be awarded the reasonable costs, disbursements, and attorney's fees herein.

c. That the Court grant such other and further relief as it may deem just, fair, and equitable.

/s/
Randall D.B. Tigue
Attorney for Defendants
2620 Nicollet Avenue
Minneapolis, Minnesota 55408
(612) 874-9903
Minn. Sup. Ct. Lic. No. 110000

Dated: April 20, 1994.

ACKNOWLEDGMENT

The undersigned hereby acknowledges that costs, disbursements, and reasonable attorney's and witness fees maybe awarded pursuant to Minnesota statutes Section 549.21, subdivision 2 to the party against whom the allegations in this pleading are asserted.

/s/
Randall D.B. Tigue
Attorney for Defendants
2620 Nicollet Avenue
Minneapolis, Minnesota 55408
(612) 874-9903
Minn. Sup. Ct. Lic. No. 110000

Dated: April 20, 1994.

UNITED STATE DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

ILQ Investments, Inc., a Minnesota corporation, and Excalibur Group, Inc., a Minnesota corporation, Plaintiffs,	**AFFIDAVIT OF ROBERT BRUCE MCLAUGHLIN**
vs.	
City of Rochester, a municipal corporation, Defendants	File No. 3-92 cv 751 (RHK)

STATE OF FLORIDA)
)ss
COUNTY OF PINELLAS)

I, Robert Bruce Mclaughlin, of the City of Indian Rocks Beach, Pinellas, Florida, hereby depose and say the following:

1. I adopt and incorporate by reference as if fully set forth herein the statements regarding my professional background, experience, and expertise contained in my Affidavit, dated October 15, 1994, submitted in support of Plaintiffs' motion for leave to file an amended and supplemental complaint in the above-entitled matter.

2. For the past several years I have conducted extensive studies in the area of urban planning, as it relates to zoning of adult entertainment uses.

3. As such, I have personally read and become familiar with virtually all of the published literature related to adverse secondary effects of adult entertainment, and have personally reviewed mots of the unpublished literature relied upon by municipal governments as it related to adverse secondary effects of adult entertainment zoning.

4. based upon your affiant's extensive professional experience, your affiant has yet to find a single municipality or

city planner that has ever studied the adverse secondary effects of general book and video stores, featuring adults-only sections consisting of a minority of the floor space, and featuring no on-premises consumption of sexually explicit material.

5. All of the adult entertainment studies relied upon by any municipality have uniformly been of adults-only theaters; adults-only bookstores, which have consisted of virtually 100 percent of sexually explicit material and featuring on-premises consumption of said material through coin-operated "peep shows"; and alcoholic and non-alcoholic bars featuring live nude dancing.

6. the reason that general video stores with adults-only sections have never been the subject of secondary effect studies has nothing to do with the newness or novelty of such entertainment forms; such entertainment forms had been common throughout the United States for at least 15 years and have been well known to city planners for that entire period of time.

7. Rather, the reason such entertainment forms have never been the form of secondary effects studies is the fact that such entertainment forms have been universally recognized as materially different in nature from adults-only bookstores, adults-only motion picture theaters, and live nude dance entertainment.

8. The chief reason why nobody ha studied the adverse secondary effect of general release video stores with adults-only sections is that no responsible city planner has ever seriously suggested that such entertainment forms cause the type of adverse secondary effects associated with adults-only theaters and adults-only bookstores, featuring on-premises consumption of such materials.

9. Your affiant executes this affidavit in opposition to defendant's motion for summary judgment.

/s/
Robert Bruce McLaughlin

Sworn to and subscribed before me
this lst day of November, 1994.

/s/
Notary Public

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF ANOKA TENTH JUDICIAL DISTRICT

City of Ramsey,
Plaintiff,
vs.
Larry Holmberg and
the Amusement Center, Inc.,
Defendant.

AFFIDAVIT OF CAMILLE NELSON
File No. C9-94-3310

STATE OF MINNESOTA)
)ss
COUNTY OF HENNEPIN)

Camille Nelson, being first duly sworn on oath, hereby deposes and says the following:

1. Your affiant is employed as a clerk at the Amusement Center Bookstore, located at 6710 Highway 10, Ramsey, Minnesota.

2. As such, your affiant has had occasion to observe the new floor layout at the Amusement center.

3. Under the new layout, the video tape viewing booths are physically blocked off, and we are under instructions to admit no one into that area of the store.

4. In addition, all of the video tape viewing booths have been disconnected from electric power so they are totally non-functional.

5. Of the remaining floor space, only 40 percent is devoted to material of a sexually explicit nature, either books, magazines, video tapes, or novelties.

6. The remaining 60 percent of the floor space in the store is devoted to items such as motorcycle magazines, car magazines, hunting magazines, and popular Mechanics types of magazines.

7. Your affiant executes this affidavit in opposition to Plaintif's Motion for Summary Judgment.

/s/
Camille Nelson

Sworn to and subscribed before me this
7th day of October, 1994.
/s/
Notary Public

STATE OF MINNESOTA
COUNTY OF ANOKA

DISTRICT COURT
TENTH JUDICIAL CIRCUIT
Case Type: Declaratory judgment

City of Ramsey,
Plaintiff,
v.
Larry Holmberg, and
The Amusement Center, Inc,
A Minnesota Corporation,
Defendants.

Court File No. C9-94-3310
AFFIDAVIT OF
ROBERT BRUCE
McLAUGHLIN

AFFIDAVIT OF ROBERT BRUCE McLAUGHLIN

I, ROBERT BRUCE McLAUGHLIN, of the City of Indian Rocks Beach, Pinellas County, Florida, MAKE OATH AND SAY AS FOLLOWS:

1. I am in practice as a land use planning Consultant and local government Consultant in the States of Florida and Minnesota, and elsewhere in the United States.

2. I have a Masters of Science degree in Political Science with a thesis on American Constitutional Law.

3. I am a member of the American Institute of Certified Planners.

4. My credentials as a land use planner have been accepted by local governments on may occasions in the past.

5. I have been qualified as an expert witness before the United States District Court for the Middle District of Florida, Jacksonville, Ocala and Tampa Divisions, the United States Bankruptcy Court for the Middle District of Florida, Tampa Divisions, the United States Bankruptcy Court for the Middle District of Florida, Tampa Division, the Hillsborough County Court, the circuit Courts for various counties in the State of Florida, the Superior Court of the State of Washington, in and for the County of King, and the Hearing Examiner for Shohomish County, Washington.

6. I am and have previously been retained as a professional land use planner in Ramsey, Rochester, Hopkins,

St. Cloud and Minneapolis, Minnesota, various cities and counties in the State of Florida and in the States of Georgia, Michigan, Missouri, New York, Ohio, South caroline, and Washington, and elsewhere, by various local governments and/or other private entities who have interests in land in the respective jurisdictions.

7. I was appointed by the Board of County commissioners of Hillsborough county, Florida, as a Zoning Hearing Master, to make recommendations with respect to applications for amendments to the Hillsborough County zoning code, applications for conditional uses, and Developments of regional Impact, and to reach conclusions of Law and to make Findings of fact and Findings of consistency or Inconsistency with the Comprehensive Plan with respect to these applications. See Laws of Florida, 1983, C. 83-416.

8. I have been engaged extensively in work involving the review of government actions, and the documentation thereof, including procedures followed for enactment, notices given, referrals made, the substance of the enactment, and the like.

9. In particular, I have previously been retained to research Zoning and other Ordinances governing adult Uses; to conduct an independent analysis, and to testify about those Ordinance s with respect to:

a) the nature of those Ordinances;
b) the methods employed in their enactment;
c) whether or not the ordinances have a reasonable planning predicate; or
d) whether the Ordinances are arbitrary and capricious either on their face, or as applied to particular properties; and
e) whether the Ordinances provide adequate alternative avenues of communication for Adult Uses.

10. I have also frequently been retained to make public records requests of local governments, and to follow-up those requests as necessary.

11. I have been retained on behalf of Defendants hereunto offer professional land use planning services with respect to land use controls on Adult Uses in the City of Ramsey, Minnesota.

12. I have been retained by operators of other Adult Uses in Alachua, Brevard, Broward, citrus, Hillsborough, Leon, Pasco, Pinellas, Sarasota and St. Johns' Counties, Florida, and in Georgia, Michigan, Minnesota, Missouri, New York, Ohio, south Caroline and Washington to offer professional planning services related to Zoning Regulations affecting Adult Uses.

13. I have personally done or supervised the work described in this Affidavit.

14. Accordingly, as set forth herein, I have personal knowledge of the matters hereinafter set forth, and am competent to make this Affidavit, and to offer the opinions herein expressed, and would be competent to testify regarding these expert opinions if called to testify at trial.

15. My resume is attached as Exhibit A to this my Affidavit.

16. In this matter, I have been asked to:

a) review the predicates, if any, for the City's Adult Use Regulations, particularly as they apply to adult bookstores with no "on-premises consumption" of adult material; and

b) determine if there i any basis for the application for the regulations to such establishments, in particular the establishment occupied by Defendant herein, or whether the application of the regulations is factually arbitrary and capricious.

17. In the course of preparing this Affidavit, I have reviewed the following documents:

a) *City of Ramsey Adult Uses, Planning Report,* 20 September, 1990, prepared by Northwest Associated Consultants, Inc. (without Exhibits);

b) *Adult Entertainment, supplement to the 1987 Zoning Study,* Division of Planning, department of

Planning and Economic development, City of St. Paul, 1988;

c) *Revised Director's Report Adult Entertainment,* City of Seattle, Seattle, Wa., August, 1989;

d) *Report of the Attorney General's Working Group on the Regulation of Sexually Oriented Businesses,* St. Paul, Minn. June 6, 1989;

e) *Adult Entertainment Land Use and Legal Perspectives*, Rochester/Olmsted consolidated Planning Department and Office of the Rochester City Attorney; Rochester, Minn., March 1988;

f) Affidavit of James J. Thomson, made March 3, 1995;

g) Plaintiff's Memorandum of Law in this case, dated March 3, 1995;

h) A study which I completed in early 1995, on the impacts of an adult book and video store without on-premises consumption of adult material, in the City of Rochester, Minnesota;

i) Material prepared by the City of Daytona Beach, Florida, on various Adult Uses;

j) Studies prepared elsewhere by me or by others; and

k) Material cites in the above documents.

18. In my study of the adult bookstore in Rochester, Minnesota, a bookstore with no "on-premises consumption" I conclusively determined that there were no "adverse secondary effects" related to said businesses.

19. In my study, I considered property values and calls for police service at the subject site and at several control uses, which included conventional book and video stores.

20. The adult bookstore had no negative impact on property values in its vicinity.

21. There was no inordinate demand for police services at the bookstore and there was no increased demand for police services in the area of the bookstore, which demand

was caused by the bookstore. (The Rochester adult bookstore is adjacent to City Hall, which has a major demand for police services.)

22. Further, there was no evidence of urban blight resulting from the presence of the Rochester adult bookstore.

23. In Daytona Beach, the City's study of various Adult Uses, specifically found that adult book and video stores, without on-premises consumption, had no adverse secondary effects, even though the City's "agenda" included an effort to close the adult bookstore that did not have on-premises consumption. A copy of the *Daytona Beach Study* is attached as Exhibit B to this my affidavit.

24. I am familiar with most of the source material listed on pp 2-3 of the *Ramsey Report.* I am not aware of any reference, let alone any discussion, in any of that material to adult book or video stores without on-premises consumption.

25. *The Ramsey Study,* without Exhibits, includes no analysis of "adverse secondary effects" and merely assets that studies elsewhere purport to find such effects.

26. There is no discussion, of which I am aware, in any of the source material to the *Ramsey Study* of adult book or video stores without on premises consumption.

27. There is no discussion in any of the St. Paul studies of adult book or video stores without on-premises consumption of adult material.

28. Further, the various St. Paul studies are academically, professionally, and scientifically unsound, and do not establish the existence of "adverse secondary effects" related to adult entertainment establishments, other than those related to bars and other alcoholic beverage establishments, without nude dance.

29. There is no discussion in the *Seattle Study,* of adult book or video stores without on-premises consumption of adult material.

30. Further, the *Seattle Study* is academically, professionally, and scientifically unsound, and does not establish the existence of "adverse secondary effects" related to Adult

Uses.

31. There is no discussion in the *Minnesota Attorney General's Report of* adult book or video stores without on-premises consumption of adult material.

32. Further the *Minnesota Attorney General's Report* is academically, professionally, and scientifically unsound, and does not establish the existence of "adverse secondary effects" related to Adult Uses.

33. There is no discussion in the *Rochester Study,* or in any of the sources therein, of adult book or video stores without on-premises consumption of adult material.

34. Further, the *Rochester Study* relies almost entirely on secondary sources which are academically professionally, and scientifically unsound, and which do not establish the existence of "adverse secondary effects" related to Adult Uses.

35. I have extensive experience in reviewing the operation of various Adult Uses, including adult book and video stores.

36. Except for conventional book or video stores with a 'segment or section" devoted to adult material, a class or facility universally ignored in the application of Adult Use Regulations, adult book store s have, until recent years, almost, but not quite, universally had on-premises consumption. (The daytona Beach store being almost unique.)

37. Based on my extensive research on adult entertainment establishments, and my careful review of the extensive body of Adult Use "studies", I have been unable to establish any governmental interest that is advanced by the regulation of adult book or video stores without on-premises consumption.

38. Even if Ramsey relied on the same studies as The City of Rochester, those studies do not establish a governmental interest in the regulation of adult book or video stores without on-premises consumption of adult material.

39. Accordingly, from a factual standpoint, I can find no justification in the material which I have reviewed, for

the City of Ramsey's reliance on the studies considered by the City of Ramsey in regulating adult book or video stores without on-premises consumption of adult material.

40. Adult book or video stores, without on-premises consumption are not reasonably similar to adult book or video stores without on-premises consumption, but are, in fact, substantially different.

41. The only studies of which i am aware which even mention adult book or video stores without on-premises consumption, are my study in rochester, and the study by the City of Daytona Beach, both of which found no adverse secondary effects resulting from adult book or video stores without on-premises consumption of adult material.

42. From a factual standpoint, there is no evidence in the material which I have reviewed, which evidence is relevant to the application of the City's Adult Use Zoning Regulations to adult book and video stores without on-premises consumption of adult material.

FURTHER YOUR AFFIANT SAYETH NAUGHT

/s/ R. Bruce McLaughlin

STATE OF NEW YORK
COUNTY OF NEW YORK
The foregoing instrument was
acknowledged before me this
13th day of April, 1995

by ROBERT BRUCE MCLAUGHLIN
who is personally known to me or
who has produced a DRIVER'S LIC.
as identification and who did take an
oath.

Seal

/s/ ALICE HARRINGTON
Notary Public
My Commission Expires:

R.BRUCE McLAUGHLIN, B.A., M.Sc. (PI),
PROJECT MANAGEMENT/LAND PLANNING
LAND DEVELOPMENT/LOCAL GOVERNMENT
CONSULTANT

EDUCATION:
Master of Science, (Planning)
University of Toronto
Department of Urban & Regional Planning
1974 (Thesis - Intergovernmental Relations
in the Planning Process)

Bachelor of Arts (Honors) York University
Political Science 1972
(Thesis - American Constitutional Law)

High School Graduate
Upper Canada College 1968

MEMBERSHIPS:
American Institute of certified Planners (1979)
Canadian Institute of Planners (1976)

CAREER HISTORY:
1983 - Present:

Principal, McLaughlin Consulting Services, Inc.[13]
Operates and own business with a variety of private and public sector projects. Projects include Land Use, Market and Financial Feasibility Studies, Position Statements, Planning Reviews, Transportation Analyses, Policy and Regulatory Documents, Applications and Approvals and Urban design. Also provides paralegal services for licensed attorneys involved in land use or local government work.

[13]And associated firms.

1985 - 1989:

Zoning Hearing Master, Hillsborough County, Florida.
Served first as Alternate, and then full-time Zoning Hearing Master for Hillsborough County, reviewing staff reports, development proposals and evidence with respect to rezoning applications, conditional use applications and alcoholic beverage requests. Presided over hearings, establishing rules of procedure, admissibility of evidence, points of law and related matters.

Made recommendations to Board of County Commissioners, with respect to planning merits, legal ramifications, findings of fact, conclusions of law, and Comprehensive Plan consistency.

1974-1983
Responsible for 17 projects with a fee value of $450,000.00, Managing budgets, timetables, client contacts and staff.
Directed planning, research and fulfillment of land development and local government projects. Responsible for presentations to clients and the public. Presented expert evidence before administrative tribunals. Planning advisor to several mid-sized urban municipalities.

In Tampa, Project Manager for all planning projects and engineering projects. Business development effort to the firm, including direct contacts and responding to requests for proposals. Corporation Administration, including contractual obligations, personnel, client liaison and general administrative procedures. Professional planning including design, document preparation and permitting.

Summers of 1971, 1972 and 1973:

Totten, Sims, Hubicki, Associates, Ltd., Willowdale, Ontario.

Responsibilities included general research, collection and

analysis of various data and the preparation of reports for the use of clients and management.

Other Positions:
Summer student - Internal Audit and Accounting Departments, **Fiberglas Canada, Ltd.**
Official - Toronto Football Officials Association.
Referee - Various school and community hockey leagues.
"Boy Friday" - Political campaigns, Toronto, Ontario area.

Accepted as an Expert Witness:
United States District Court, Middle District of Florida, Tampa, Fort Myers, Ocala and Jacksonville Divisions;
United States Bankruptcy Court, Middle District of Florida, Tampa Division;
Circuit Courts: Pinellas, Hillsborough, Sarasota, Alachua, Broward ad Leon Counties, Florida;
Superior Court, County of King, Washington
County Court, Hillsborough County
Hearing Examiner, Snohomish County, Washington
Various Code Enforcement Boards;
Pinellas County Property Appraisal Adjustment Board:
Ontario Municipal Board.

SUMMARY OF EXPERIENCE:
An experienced, analytical land planner local government consultant and market analyst, highly skilled in land use, market feasibility and transportation studies, rezoning and urban design, land development, planning and management, and local government affairs. As Chief executive Officer involved in corporate administration, client presentations, and acting as liaison between clients and approving agencies. Offering services to business and to the development, property management and resource industries.

EXPERIENCE AND EXPERTISE INCLUDE:

Urban Planning:

- Development Planning;
- Planning Feasibility Studies; Planning Reviews and Position Statements;
- Market Feasibility Studies;
- Financial Feasibility Studies;
- Economic Impact Statements;
- Transportation Analyses;
- Public Presentation/Hearings;
- Preparation of Policy Documents and Regulations;
- Community Improvement Plans;
- Shopping Center and Other Retail Studies;
- Industrial Development Studies;
- Housing and Land Needs Studies;
- Solid Waste and Resource Recovery Studies;
- Airport studies;
- Expert Witness Services;
- Paralegal Services.

Project Management:

- Managed a portfolio of seventeen projects with a value of $450,000 in planning services.
- Business development work bringing in two of the companies top ten 1980 projects, plus a number of other new projects.
- Supervising junior and technical staff working on a variety of projects.
- Project management, including client contracts preparation and administration of contracts, monitoring the MIS and invoicing.
- Management of planning, land development and construction contracts from the original contact through to approval and construction.

Accomplishments:

- Urban design for retail and office commercial developments;
- Residential design for low and medium density projects.
- Industrial park design for small and large projects
- Feasibility studies and pre-design reports;
- Acquisition and monitoring of land development and construction permits;
- Preparation of and application for rezoning and comprehensive plan amendments;
- Industrial Park Location and Feasibility Studies
- Negotiations with contractors and approving agencies, construction management;
- Land Use studies for various special uses;
- Site location and selection;
- Safety plan for airport construction project;
- Preparation of zoning ordinances and related reports;
- Specialized studies and experience in landfill projects, hazardous waste projects, and airport projects.
- Improvements in corporate administration and business development;
- Major feasibility studies for urban development projects;
- Business development success and company image improvements;
- First formalized contracts with clients for on-going advisory services;
- Developed new method of preparing for hearings and trials;
- Special studies for land needs, housing, retail, office and industrial developments.

PERSONAL:
Born October 15, 1949
References Available on Request

Overview of problems dealing with
the investigation of prostitution and pornography in the City of Daytona Beach

A. These days and times prostitutes are coached by their attorneys on ways to avoid arrest or cause the officer to get into an entrapment situation.

The prostitute will say:

1. "You tell me what you want."
2. "You tell me how much you will give me."
3. "Do you swear you're not a police officer?"
4. "You take off all of your clothes first."

Prostitutes know that the officer cannot make the offer, she has to, so if the "John" makes the offer, he must not be a cop. Also that most police departments do not allow any officer to take off all of his clothes prior to making an arrest. This is also a good way for a prostitute to look for a body transmitter, gun, badge, handcuffs, etc. Presently the average sentence for a prostitute convicted in Daytona Beach is time served to thirty days. Our records show a total of eighty three prostitution arrests for this year. The total for last year was one hundred eighty three.

B. The only people in a community that can declare any xxx book, magazine, or film pornographic are the judges in that community. Every book, magazine, or film also has to be determined on a individual basis.

To make an arrest or confiscate an xxx movie at a porno theater the following steps must be taken.

1. A police officer must view the film in the theater and make a written report on its contents.

2. A search warrant has to be prepared in order to go into the theater and seize the film.

3. The judge then views the film and makes his determination.

4. If the judge declares the film pornographic, it can be destroyed.

5. This only stops that particular film from being shown in Daytona Beach.

C. The State Attorney's Office Organized Crime

Unit investigated pornography in Daytona Beach for approximately eighteen months from 1976 through 1977. It involved a lot of time, money, manpower and persistence by the investigating officers and prosecutors. The porno industry in Daytona Beach was being hurts.

Two of the main players were finally convicted after lengthy trials, appeals, etc. The officers reward for their lengthy, costly eighteen months investigation was that the subjects were sentenced to one year's probation and a $1,000.00 fine. Both subjects are back in the porno business at this time.

Porno investigations were dropped after that because no one can justify eighteen months of investigation and thousands of dollars spent for a resulting sentence of one year probation on a $1,000.00 fine.

D. A single prostitution arrest at a business such as a tanning spa, photo place, or xxx movie theater is not enough to charge the owner or operator of the business. The owner or operator merely maintains he or she did not know the girl was doing anything like that and in return the owner or operator pays for the arrested employee's bond and legal fees. Lengthy investigations have not proved successful because of the rapid turnover rate of prostitutes working at these businesses.

E. Very often if a porno book store or theater is connected with organized crime, which many are, they will change their corporate name and

corporate officers every six months just to keep the police from being able to investigate their bank accounts and follow the flow of their monies.

F. Last but not least is the profit margin in the porno business. A xxx rated book that might have cost $2.00 or $3.00 to produce may sell for as much as $25.00 to $30.00. A video cassette xxx film sells for approximately $100.00. These people are financially very well off and are able to drag us through lengthy court battles which costs the state thousands of dollars and keeps the officers in court more time than on the street.

The following is a list of sexually oriented businesses in Daytona Beach and their activities

1. Danish Book Store, 120 Orange Avenue, books, magazines, novelties, movie booths and films

   A. Several arrests have been made involving lewd and lascivious conduct within the business.

2. Beach Street Cinema, 250 South Beach Street, xxxx rated theater (Porno movies).

As in all your adult theaters, show sec films doing everything from A-Z -- no restrictions whatsoever.

   A. Several arrests have been make in regards to lewd and lascivious conduct.

   B. Prostitutes frequent the business

and sex is often solicited.

C. Nude dancing arrest -- on stage.

D. Confiscated films from the theater.

Most of the above cases, with the exception of the films, were dropped or dismissed. On the film charges, there was a year and a half investigation. After conviction the sentence did not fit the crime.

3. The News Mart, 214 North Beach street, books, magazines.

There have been no problems at this business. The books are wrapped in plastic foil and customers are not allowed to read them. A separate area is marked off.

4. Photo Palace Studio, 545 Ballough Road, Photo studio -- live nude models.

A. Several arrests for prostitution made at this location. Some charges have been dropped by the State Attorney's Office.

B. This is a more difficult location to work than the rest. Your need to pay for a model of your choice and either bring your own camera or rent one of theirs. Once the photo session being they wait to allow you to make the move. (Under state

law they have to make the offer first.

5. Mens Paradise Tanning Spa, 825 N. Ridgewood Avenue, Tanning studio -- live topless dancers.

   A. Again several arrests have been make but the charges were subsequently negotiated or dropped.

   B. The business is apart of a chain of tanning spas.

6. Capri Theater, 715 N. Ridgewood, xxxx rated theater -- novelties.

   A. Several arrests have been made both in and out of the theater for lewd and lascivious behavior.

   B. Arrests related to prostitution and homosexual activities have been made both in the theater and outside.

7. Shingle Shack, Madison Avenue, topless dancing -- wet t-shirt contest.

   A. Several arrests have been name of the dancers for lewd and lascivious conduct.

   B. Major prostitute hang-out -- Many arrests have been made in the area including the arrest of

customers who get carried away during performances.

8. The Book Shack, Madison Avenue, right across the street from the Shingle Shack, books, magazines, novelties, movies booths, films.
   A. Arrests for lewd and lascivious conduct.

The area of business 5 through 8 result in our biggest problems. So far we have a total of five homicides directly related to prostitution and drugs in the past three years alone. In this area we have also had numerous rapes and robberies related to the types of people who frequent the area.
This area is a haven for prostitutes who are very aware of our difficulties in making arrests due to the restriction in the laws and language that must be used if a prostitute is picked up. They will in some cases, want the officer

During Race Weeks the activities grow in teas area. New faces tins up from Texas, Georgia and Tip. Anywhere from 15-20 additional out of state prostitutes show up.

We have used female police officers in this area and also in the Atlantic Avenue area to help combat the problem. Prospective male customers were arrested when they proposition the female officers. Our results were very productive. Approximately sixty arrests were make in two nights. Most of the males did not go to court. Several did, and even after going to court, they were found <u>not guilty</u> by the jury even through all elements were proven. We

have also been warned against using female officers in the future. The judges don't like it and neither does the State Attorney's Office. In addition to this, there is very little that a female officer can do in making a case. One court ruled that a female officer waiting outside a bar who licked her lips was entrapment.

In furthering our attempts to clean up this area, we have used a multitude of state laws, hitch-hiking, loitering and prowling, obstructing traffic, disorderly conduct and just about anything that remotely applies to the situation. These techniques in general have not been effective.

Another technique used has been the use of complaint affidavits against prostitutes. We stop a vehicle that has just picked up a prostitute and question the male. The male is asked to sign a complaint. This technique has not been successful.

In our attempts to use the state prostitution statute, some of our local judges have interpreted in a very strict and restrictive manner.

9. Pandora's Box, 319 Second Avenue, Topless dancing.

A. Several dancers have been arrested.

B. Several arrests have been made for prostitution from inside as well as outside the business.

C. Several robberies and assaults occur at the business.

10. A. Several prostitution arrests have been made.

B. Lewd and lascivious arrests have been made.

C. One of the rapists in that area frequently used the theater for viewing film and would then go and commit a rape. Some eight victims were reported before he was arrested.

11. Diversified International Trade Corporation, 1728 Derbyshire Road, Holly Hill, Florida.

Dating service.

A. Arrested the owner and one of the girls.

B. The business works in and out of the city but is licensed in the county.

12. Plantation Club, 600 N. Atlantic Avenue

A. Male go-go dancers

B. Customers frequently become incited to engage in lewdness

13. Lovely Linda, Auditorium and Atlantic

A. Female topless go-go dancers.

B. Customers frequently become incited to engage in lewdness.

14. Red Garter, Main and Atlantic

same problems as above

15. Playmate Club, South Atlantic

same problems as above

16. Function Junction, South Atlantic

same problems as above

17. Shark Lounge, Broadway Avenue

same problems as above

19. The Newsstand, 727 Main Street
Books, novelties, movie booths and films.

20. Frank's News Stand, 744 Main Street, books, magazines

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF ANOKA TENTH JUDICIAL DISTRICT

City of Ramsey,
Plaintiff, AFFIDAVIT OF
vs. RANDALL D.B. TIGUE
Larry Holmberg and
the Amusement Center, Inc., Court File No. C9-94-3310
Defendant

STATE OF MINNESOTA)
)ss
COUNTY OF HENNEPIN)

Randall D.B. Tigue, being first duly sworn on oath, hereby deposes and says the following:

1. Your affiant is the attorney for Defendants in the above-entitled matter.

2. Your affiant was also the attorney for Plaintiffs in ILQ Investments, Inc. v. City of Rochester, 816 F. Supp. 516 (D. Minn. 1993), rev'd 25 F. 3d 1413 (8th CIr. 1994).

3. Subsequent to the Eighth Circuit's decision in the above-entitled matter, Defendant City of Rochester, represented by the same counsel as Plaintiff in the instant case, brought a motion for summary judgment, seeking to enjoin the operation of an adult bookstore in the City of Rochester.

4. Your affiant opposed said motion, inter alia, on the ground that the city in that case sought to enjoin Plaintiffs from operating an "adult bookstore" within the meaning of the ordinance, but failed to define the specific conduct it sought to enjoin, i.e., the volme of sexually explicit material which the store could continue to sell or rent, and still not constitute a "substantial or significant portion" within the meaning of the ordinance.

5. In response, the City of Rochester advised the presiding judge that it was seeking to amend its ordinance to set forth a specific definition of "substantial or significant" so as to enable an injunction to define with particularity, the conduct

sought to be enjoined.

6. In response to the process of legislative amendment, your affiant retained theservices of McLaughlin Consuolting Services, Inc., to conduct an empirical study of purely take-home, off-premises consumption establishments, featuring varios percentages of adult materials.

7. Specifically, your affiant retained McLaughlin Consulting Services to determine whether or not the percentages of adults-only material sold or rented in a book and video stores made any difference in terms of adverse secondary effects on the surrounding neighborhood.

8. Accordingly, R. bruce McLaughlin of McLaughlin Consulting Services, Inc., proceeded to conduct a secondary effects study measuring property values and crime in the areas surrounding the bookstore operated by Plaintiffs in ILQ Investments, Inc. v. City of Rochester, which features approximately 40 pecent adults-only material, around Econo Video, which features some adults-only material, but under l0 percent; Blockbuster video, which features no adults-only videos, and Christian Book and Gifts, which features exclusively religious literature and gifts.

9. On January ll, l995, your affiant presented a preliminary version of Mr. McLaughlin's final report to the Rochester Planning Commission, pointing out that ther existed no relationship whatsoever between the percentage of adult videos sold and rented or take-home basis and any adverse secondary effects. A copy of the preliminary version of the report is attached hereto as Exhibit A.

l0. The minutes of the Planning Commission reflecting the response to these facts are attached hereto as Exhibit B.

ll. On February 6, l995, your affiant presented the final version of McLaughlin's report to the Rochester City Council, which sat in consideration of the proposed amendment to the zoining ordinance. A transcription of the tape recording of the Rochester City Council meeting, at which the counsel considered McLaughlin's report is attached hereto as Exhibit C.

12. The initial recommendation presented by staff to both the Rochester Planning Commission and the City Council, a copy of which is attached hereto as Exhibit d, defin the term "adult bookstore" as one which is "at least l/3 of the inventory, stock in trade, or publicly displayed merchandise" or "at least l/3 of the portion of the floor area of the business": is devoted to sexually explicit material.

l3. After repeated expression of concern by members of the City Council and the Planning Commission that the percentage of permitted adult material be reduced to the minimum which counsel thought would pass constitutional muster, the Rochester City Council reduced the percentage to 25 percent.

l4. Your affiant executes this affidavit in opposition to Plaintiff's renewed motion for summary judgment.

/s/
Randall D.B. Tigue

Sworn to and subscribed before me
this l4th day of April, l995
Marilee Kaeder
Notary Public

Mclaughlin Consulting Services, Inc.
900 Gulf Boulevard, Suite 303
Indian Rocks Beach, Florida 34635
Ph: 813/595-7634 Fax 813/593-9581

January 10, 1995
9441

Randall D.B. Tigue, Esq
Attorney at Law
2620 Nicollet Avenue South
Minneapolis, Minn. 55408

Dear Mr. Tigue,

Re: Secondary Effects, Downtown Book & Video, Rochester, Minnesota

Pursuant to your request, please accept this letter as a preliminary report on the issue of "adverse secondary effects" as they relate to the Downtown Book & Video store in Rochester, Minnesota. As you are aware, we are in the process of preparing a detailed appropriate. In the meantime, this letter will serve as a preliminary report on the issues of property values and demand for police services.

To properly analyze the effect of a particular land use on different planning factors, it is necessary to compare the effects of the subject land use with "control uses". The control uses are either uses with similar characteristics, or other land uses which might be problematic, and which show the nature of "adverse secondary effects," suffered by generic commercial operations, without regard to the type or content of the business.

In Rochester, we are doing a two level analysis. We have looked at a total of three control uses, to compare specific property values in the areas of the control uses and in the area of Downtown Book & Video.

The specific control uses considered are:

Christian Book & Gift Shop, 815 N. Broadway

Blockbuster Video, 455 ll Avenue N.W.

Book Review, 6ll N. Broadway

Downtown Book & Video opened in the summer of l992, so that property value data for the end of l992 and the end of l993 (the most recent available,) are relevant. Police data were provided for a variety of periods, and were analyzed for the one year period ending l2/3/94.

PROPERTY VALUE DATA

Property values at Downtown Book and Video and at two of the three control uses remained constant after the Downtown Book was opened. Property values at Christian Bookstore fell 4.24%. The property value analyses of the areas is still underway, and will be reported to you shortly.

Accordingly, there is no evidence that Downtown Book & Video has had any secondary effects related to property values.

POLICE DATA

Police data for the areas of Downtown Book & Video and the control uses have not yet been provided by the City Police Department, but are expected next week. Data for the individual businesses are as follows:

Downtown Book & Video had l5 calls for police service in the period ending l2/3/94. Of these l5 calls, none related to the specific nature of the business, four were incidental (assigned to the address but not related to it,) and ll were calls any business could experience, (five burglar/alarms; four shoplifting; one trespassing and one theft, other).

In the same period, Christian Book had four calls, one incidental, and three that any business might experience; Blockbuster had l8 calls, including four incidental calls and l4 calls that any business could experience, (including two suspicious circumstances, one suspicious person, one robbery alarm, and one disorderly conduct); and Book Review had two calls, both of which any business might experience.

Thus, while Downtown Book & Video had a higher demand for police services than did two of the control uses, it had a significantly lower demand than did Blockbuster Video.

Further, Blockbuster had more serious incidents including the robbery, the suspicious persons or circumstances, and the disorderly conduct. Accordingly, there is no evidence that Downtown Book and Video has had inordinately high demand for police services, or secondary effects related to criminal activity.

CONCLUSION

Based on the research conducted to date, there is no evidence of adverse secondary effects (declining property values or increased demand for police services,) associated with Downtown Book & Video.

Yours very truly,
McLaughlin Consulting Services, Inc.
/s/
R. Bruce McLaughlin, AICP
President

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF ANOKA TENTH JUDICIAL DISTRICT

City of Ramsey,
Plaintiff,
vs. AFFIDAVIT OF
Larry Holmberg and LARRY ALLAN HOLMBERG
Defendant.
File No. C9-94-3310

STATE OF MINNESOTA)
)
COUNTY OF HENNEPIN)

1. Your affiant is the individual Defendant in the above-entitled matter.

2. Your affiant is the president of the Amusement Center, Inc., a Minnesota corporation and the corporate Defendant in the above-entitled matter.

3. Your affiant has review the renewed motion for summary judgment submitted by Plaintiff in the above-entitled matter.

4. Your affiant has particularly noted Plaintiff's reliance upon ILQ Investments, Inc. v. City of Rochester, 25 F. 3d 1413 (8th Cir. 1994).

5. Your affiant also became aware that, subsequent to the Eighth Circuit's decision in ILQ Investments, Inc. the Rochester City Council considered and re-wrote the ordinance to specify a specific percentage of adults-only material which would distinguish between those adult uses which cause adverse secondary effects and are thus subject to adult zoning regulations, and those uses featuring more limited adults-only material, not so subject to regulation.

6. Your affiant became aware that following the ILQ Investments decision in the Eighth Circuit, the Rochester City Council set the cutoff figure for adult uses subject to zoning restrictions at 25 percent of floor space or stock in

trade.

7. Accordingly, your affiant modified the bookstore in Ramsey, so as to limit adults-only material to 25 percent of the floor space and under 25 percent of the total stock in trade.

8. Attached hereto as Exhibit A is an interior floor plan of the current bookstore in Ramsey, Minnesota. It was drawn to scale by Thomas Barbeau, a licensed architect.

9. All adult-only material are contained in the area designated on the drawing as "sales area #2."

10. The entire area designated as "sales area #1" consists of material other sexually explicit video tapes, books, magazines, or rubber goods.

11. As Exhibit A indicates, sales area #2 consist s of 510 square feet, or exactly 25 percent of the floor space.

12. Were our affiant's store located in the City of Rochester, it would be fully in compliance with the adult entertainment zoning ordinance which that city promulgated in direct response to the ILQ Investments decision of the United States Court of Appeals for the Eighth Circuit.

/s/_____
Larry Allan Holmberg

Subscribed and sworn to me
this __ day of _____, 1995.

_____
Notary Public

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

David J. Schneider, Jr.; Garry Holmberg; Larry Holmberg; the Amusement Center, Inc., a Minnesota corporation,
Plaintiffs,

vs.

The City of Ramsey, a municipal corporation,
Defendant.

PLAINTIFFS' FOURTH AMENDED COMPLAINT

File No. 4-90 Civ. 320

JURISDICTION

1. The jurisdiction of this Court is invoked under the laws of the United States, and in particular, Title 28 U.S. C. Sections 1343(3), 2201 and 2202; Title 42 U.S.C. Section 1983, and the Constitution of the United States, in particular, under the First and Fourteenth Amendments thereto, this being an action authorized by law to redress the deprivation under color of state law, statute, ordinance, regulation, custom and usage of rights, privileges, and immunities guaranteed to Plaintiffs under the Constitution of the United States.

PARTIES

2. Plaintiff Larry Holmberg is a citizen of the United States and of the State of Minnesota. He is the owner of real estate located within the City of Ramsey, County of Anoka, located at 6710 Highway 10 Northeast. He is the purchaser of an executory contract of the interest of Plaintiff Garry Holmberg in an adults-only bookstore at that location. Plaintiff Larry Holmberg re-acquired his interest in the real estate as a result of the abandonment of an attempted purchase of said real estate by Plaintiff David J. Schneider, Jr.

3. Plaintiff Amusement Center, Inc., is a

corporation organized under the laws of the State of Minnesota. Its sole officer and shareholder is Plaintiff Larry Holmberg. It currently operates an adults-only bookstore located in the real estate owned by Plaintiff Larry Holmberg.

4. Defendant City of Ramsey is a municipal corporation, organized under the laws of the State of Minnesota. As such, it has the authority to enact municipal ordinances regulating the licensing and zoning of businesses, and to impose criminal penalties to enforce such ordinances.

CAUSE OF ACTION

5. On or about March 15, 1990, Plaintiff Garry Holmberg applied for and received from Defendant City of Ramsey a license to operate an amusement center at the building owned by Plaintiff at 6710 Highway 10 Northwest, Ramsey, Minnesota. A copy of said license is attached hereto as Exhibit A and incorporated by reference as fully set forth herein.

6. On or about April 19, 1990, pursuant to the license issued by Defendant City of Ramsey, Plaintiff Garry Holmberg opened an amusement center at said address, featuring coin-operated motion picture viewing machines for viewing of adults-only motion picture films on the premises. Also featured on the premises was the sale of adults-only books and magazines.

7. On or about May 11, 1990, Plaintiff Garry Holmberg entered into an executory agreement to convey his interest in the adult bookstore business to Plaintiff Larry Holmberg, said agreement to become effective, upon the transfer of the license to operate said business to Larry Holmberg.

8. The foregoing activities engaged in by Plaintiffs Garry Holmberg and Larry Holmberg are entitled to protection under the First and Fourteenth Amendments to the Constitution of the United States.

9. The adult bookstore and entertainment center operated by Plaintiffs Garry Holmberg in the building owned by Plaintiff Larry Holmberg is the only building within

Defendant City of Ramsey offering adults-only motion pictures for viewing on the premises and adults-only books and magazines.

10. On April 23, 1990, solely in response to the opening of the adult bookstore and amusement center on Plaintiffs' premises, Defendant City of Ramsey adopted ordinance No. 90-7, a copy of which is attached hereto as Exhibit B and incorporated by reference as if fully set forth herein.

11. Said ordinance provided as follows:

SECTION 1. PREAMBLE.

Whereas, the Council finds that a business advertising itself as an 'adult bookstores' (sic) is contemplated doing business in the City of Ramsey in the City's B-1 business district zone; and

Whereas, the Council finds that proper planning for the citing of Adult Bookstore within the City is necessary in order to protect the City's planning process and the health, safety and welfare of the city; and

Whereas, the Council finds that an interim ordinance placing a moratorium on the sighting and/or use of any property within the City as an Adult Bookstore is necessary in order to permit the planning process to take place; and

Whereas, the Council finds that it is necessary for an immediate preservation of the public peace, health, morals, safety and welfare that an emergency interim ordinance be adopted prohibiting the sighting, maintaining and operating of Adult Bookstore within the City pending completion of the planning process

relating thereto.

SECTION 2. AUTHORITY.

This ordinance is adopted pursuant to that authority granted the City in MSA 462.355 Subd. 4 entitled 'Interim Ordinance' and City Charter Provision Section 3.06 entitled 'Emergency Ordinance'.

SECTION 3. DEFINITIONS.

a. ADULT BOOKSTORE.

A business engaging in the barter, rental, or sale of items consisting of printed matter, slides, records, audio tapes, video tapes or motion picture film, if such shop is not open to the public generally but only to one or more classes of the public, excluding any minor by reason of age, or if a substantial or significant portion of such items are distinguished or characterized by an emphasis on the depiction or description of 'specified sexual activities' or 'specified anatomical areas.'

b. SPECIFIED ANATOMICAL AREAS:

1. Less than completely and opaquely covered human genitals, pubic region, buttocks, anus, or female breast(s) below a point immediately above the top of the areola; and,

2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

c. SPECIFIED SEXUAL ACTIVITY:

1. Actual or simulated sexual intercourse, oral copulation, anal intercourse, oral-anal copulating, bestiality, direct physical stimulation of unclothed genitals, flagellation or torture in the context of the sexual relationship, or the use of excretory functions in the context of the sexual relationship and any of the following sexually-oriented acts or conduct; anilingus, buggery, coprophagy, coprophilia, cunnilingus, fellatio, necrophilia, pederasty, pedophilia, piquerism, sapphism, zooerasty; or

2. Clearly depicted human genitals in the state of sexual stimulation, arousal or tumescence; or

3. Use of human or animal ejaculation, sodomy, oral copulation, coitus, or masturbation; or

4. Fondling or touching of nude human genitals, pubic region, buttocks, or female breasts; or

5. Situations involving a person or persons, any of whom are nude, clad in undergarments or in sexually revealing costumes, and who are engage din activities involving the flagellation, torture, fettering, binding or other physical restraint of any such person; or

6. Erotic or lewd touching, fondling or other sexually-oriented contact with any animal; or

7. Human excretion, urination, menstruation, vaginal or anal irrigation.

SECTION 4. PUBLIC HEARING AND STUDY.

The City Council hereby directs city staff to study the citing of each adult bookstore as above defined and schedule a public hearing for May 29, 1990, at which time public comment will be accepted and received regarding the placement and location of Adult Bookstores within the City.

SECTION 5. PROHIBITION.

During the term of this ordinance no adult bookstores shall be cited, operated or maintained or otherwise do business within the City of Ramsey.

SECTION 6. EFFECTIVE DATE.

This Emergency Ordinance becomes effective upon it (sic) passage and shall be in effect for a period of 180 days from the date hereof.

SECTION 7. VIOLATION.

A violation of any portion of this ordinance shall be construed a misdemeanor punishable by imprisonment for up to 90 days and a fine of $700.00, or both. Each day that a violation occurs shall be considered a separate offense."

12. Said ordinance took effect on April 24, 1990.
13. On May 11, 1990, this Court issued a temporary

restraining order prohibiting enforcement of Ramsey Ordinance No. 90-7, pending a hearing on a motion for preliminary injunction.

14. Subsequent to the issuance of the Temporary Restraining Order, Plaintiff Larry Holmberg acquired the interests of Plaintiffs Schneider and Garry Holmberg, and incorporated the operation of his business as Plaintiff Amusement Center, Inc.

15. On May 22, 1990, Defendant amended Ramsey Ordinance 90-7 and substituted in its place, Ramsey Ordinance 90-9, a copy of which is attached hereto as Exhibit C, and incorporated by reference as if fully set forth herein.

16. Said ordinance, by its own terms, expired on November 18, 1990.

17. On November 13, 1990, prior to the expiration of Ordinance No. 90-9, the city council of Defendant City of Ramsey enacted Ordinance No. 90-23, a copy of which is attached hereto as Exhibit D, and incorporated by reference as if fully set forth herein, which ordinance constituted a permanent ordinance regulating the location of adult entertainment within the City of Ramsey.

18. Section 2 of Ordinance No. 90-23 amends Section 9.02 of the Ramsey City Code to define "adult uses" as follows:

> "Adult uses include adult bookstores, adult motion picture theaters, adult motion picture rental, adult mini-motion picture theaters, adult massage parlors, adult steam room bathhouse/sauna facilities, adult companionship establishments, adult rap/conversation parlors, adult health/sports clubs, adult cabarets, adult novelty businesses, adult motion picture arcades, adult modeling studios, adult hotels/motels, adult body painting studios, and other premises, enterprises, establishments, or businesses open to some or all members of the public, at which or in which there is an emphasis on the

presentation, display, depiction or description of 'specific sexual activities' or 'specified anatomical areas' which are capable of being seen by members of the public."

19. An "adult bookstore" is defined in the same section of the code, under Ordinance 90-23 as follows:

"A building or portion of a building used for the barter, rental or sale of items consisting of printed matter, pictures, slides, records, audio tape, or motion picture film if such building or portion of a building is not open to the public generally that only to one or more classes of the public extending any minor by reason of age or if a substantial or significant portion of such items are distinguished or characterized by an emphasis on the depiction of a description of 'specified sexual activities' or 'specified anatomical areas.'"

20. The same section of the ordinance defines an "adult motion picture arcade" as follows:

"Any place to which the public is permitted or invited wherein coin or slug-operated or electronically, electrically or mechanically controlled or operated still or motion picture machines, projectors or other image-producing devices are maintained to show images to five or fewer persons per machine at any one time, and where the images so displayed are distinguished or characterized by an emphasis of depicting or describing 'specified sexual activities' or 'specified anatomical areas'."

21. The same section defines the term "adult use -- novelty business" as follows:

"A business which has as a principal activity the

sale of devices which stimulate human genitals or devices which are designed for sexual stimulation."

22. Section 8 of the ordinance amends Section 9.10 of the Ramsey Code of Ordinances to impose the following restrictions on adult businesses within the City of Ramsey:

"a. Adult use-principal shall be located at least 1,000 radial feet, as measured in a straight line from the closest point of the property line of the building upon which the adult use-principle is located to the property line of:

1. Residentially zoned property.
2. A licensed day care center.
3. A public or private educational facility classified as an elementary, junior high or senior high.
4. A public library.
5. A public park.
6. Another adult use - principal.
7. An on-sale liquor establishment.

b. Adult use-principal activities as defined in this chapter shall be classified as one use. No two adult uses-principal shall be located in the same building or upon the same property and each shall be subject to this section.

c. Adult use-principal shall adhere to the following signing regulations.

1. Sign messages shall be generic in nature and shall only identify the type of business which is being conducted.
2. Sign messages shall not contained material classified as advertising.
3. Signs shall comply with the requirements of size and number for the district in which they are located."

23. Plaintiffs' current operation of their adults-only bookstore at its current location violates the ordinance in at least the following respects:

a. Plaintiffs' current operation features three separate and distinct adult uses, to-wit: an adults-only bookstore, an adults-only movie arcade, and an adult business--novelties, in the same building, in violation of Section 9.1119, Subd. 3b.

b. The location of the premises violates Subd. 3(a) of the same section, in that it is within 1,000 feet of residentially zoned property and a license day care center.

24. Plaintiffs' current operation is a lawful non-conforming use, in that it was lawfully in operation prior to the enactment of either Ordinance Nos. 90-7, 90-9, or 90-23. As such, Plaintiffs' operation is governed by the provisions of Section 9.11.19 of Ordinance No. 90-23, which provides as follows:

> "Adult uses which are classified as legal non-conforming uses may continue in accordance with the provision of this chapter, except that any such non-conforming use shall be terminated and become illegal on and after 31 December 1991. To the extent possible, the City shall attempt to identify all such uses which become classified as non-conforming under the provisions of this subdivision and shall notify the proper owners and operators of such uses in writing of the change in status and the terms and conditions which apply. The owner of any property on which an adult use is located may apply to the Council for an extension of the termination date. Any such application shall be in writing and received by the City no later than 1 October 1991. Failure to submit a timely extension application shall constitute a waiver of the right to request an exception, if upon the council's determination, the applicant

demonstrates that the amortization period is an unreasonable burden upon the business and does not allow adequate time to recover a reasonable return upon the business investment. The applicant shall have the burden of proof to demonstrate hardship with the established termination date and also the time required for an extension. In making its decision, the Council may consider any factor relevant to the issue, including but not limited to:

(a) The degree or magnitude of the threat to public health, safety and general welfare posed by the secondary impacts of the operation.

(b) The length of time that the adult use has been operating.

(c) The ease by which the property could be converted into a conforming use.

(d) The nature and character of the surrounding neighborhood.

(e) The value and condition of the improvements on the property.

(f) The amount of the applicant's investment in the business.

(g) The amount of investment already realized.

(h) The cost of relocating the adult use."

25. By contrast, under Ramsey Code of Ordinances Section 9.11, also adopted as part of Ordinance No. 90-23, all

other non-conforming uses in the city are permitted to continue indefinitely, unless there exists a "documented study in evidence," demonstrating that such non-conforming uses "pose a danger and/or threat to the health, safety and general welfare of the community," in which event an amortization period of up to five years is permitted.

26. Ramsey Ordinance No. 90-7, the initial moratorium ordinance enacted by the Ramsey City Council on April 23, 1990, 1990, was facially unconstitutional and unconstitutional as applied to Plaintiffs for the followings reasons:

a. Because the ordinance was enacted without any factual support as to its necessity to combat adverse secondary effects, the ordinance was not a content-neutral regulation of location, but rather an impermissible content-based attempt at censorship, in violation of Plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution.

b. Because the ordinance did not merely regulate the location of adults-only businesses, but totally banned them from the city of Ramsey, the Ordinance had the effect of substantially curtailing the availability of adult entertainment within the City of Ramsey, and as such, constituted an unlawful prior restraint upon Plaintiffs' rights to freedom of speech and of the press, as guaranteed by the First and Fourteenth Amendments to the United States Constitution.

27. Ramsey Ordinance 90-23, enacted to replace the moratorium ordinances, is facially unconstitutional and unconstitutional as applied to Plaintiffs for the following reasons:

a. The ordinance was enacted without sufficient empirical support as to its necessity to combat adverse secondary effects, rendering the ordinance not a content-neutral location of location, but rather an impermissible content-based attempt at censorship, in violation of Plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution.

b. The operation and effect of the ordinance will

be to ban adult entertainment totally from the City of Ramsey, or at least substantially curtail its availability, in that it will outlaw Plaintiff's existing adults-only operation, prevent him as a matter of law from relocating that operation as presently constituted anywhere in the city, and preclude him, as a practical matter, from relocating any part of that business anywhere within the City of Ramsey.

c. Because the ordinance was clearly intended to effect an absolute ban on adult business, rather than mere locational regulation, its stated purpose is merely pretextual and it was enacted for the purpose of censorship rather than zoning.

d. Because the ordinance amortizes out of existence Plaintiffs' adult businesses in a manner not done to any other non-conforming use, the ordinance deprives Plaintiffs of equal protection of the laws in violation of the First and Fourteenth Amendments to the United States Constitution.

e. The sign regulations in the ordinance constitute impermissible content-based censorship, in violation of the First and Fourteenth Amendments to the United States Constitution.

EQUITY AND IRREPARABLE INJURY

28. Plaintiffs re-allege the allegations set forth in Paragraphs 1-26, supra.

29. Unless enforcement of Ramsey Ordinance No. 90-23 is temporarily and permanently enjoined, Plaintiffs will suffer irreparable injury, in that they will be restrained from the exercise of rights guaranteed by the First and Fourteenth Amendments to the United States Constitution.

DAMAGES

30. Plaintiffs re-allege the allegations set forth in Paragraphs 1-26, supra.

31. As a result of the enactment of the original ordinance 90-7, Plaintiffs' predecessor, not wishing to face criminal prosecutions under the ordinance, closed his business until the issuance of a temporary restraining order on May 11, 1990, resulting in a loss of income yet to be determined.

32. As part of his agreement with Plaintiff Garry

Holmberg, Plaintiff Larry Holmberg received from Plaintiff Garry Holmberg any and all interest in money damages under the present lawsuit.

33. Plaintiff Larry Holmberg is entitled to compensatory damages for said lost income.

WHEREFORE Plaintiff requests the judgment and decree of this Court as follows:

a. That this Court enter a declaratory judgment declaring Ramsey City Ordinance No. 90-23 to be facially unconstitutional and unconstitutional as applied to Plaintiffs, as a violation of the First and Fourteenth Amendments to the United States Constitution.

b. That he Court enter a preliminary and permanent injunction, and until a hearing on a preliminary injunction can be had, a temporary restraining order, restraining and enjoining Defendant, its agents, officers, employees, and persons acting under its direction and control from taking any action to enforce the provisions of Ramsey City Ordinance No. 90-23 against Plaintiffs.

c. That Plaintiffs be awarded damages against Defendant commensurate with any income loss occasioned by the unconstitutional ordinances in question.

d. That Plaintiffs be awarded their reasonable costs, disbursements, and attorney's fees pursuant to Title 42 U.S.C. Section 1988.

e. The Court grant such other and further relief as it may deem just, fair and equitable.

/s/

Randall D. B. Tigue
Attorney for Plaintiffs
2620 Nicollet Avenue
Minneapolis, Minnesota 55408
(612) 874-9903

Dated: March 18, 1991.

VERIFICATION

STATE OF MINNESOTA)
COUNTY OF HENNEPIN)

Larry Holmberg, individually and in his capacity as President of Plaintiff Adult Amusement Center, Inc., being first duly sworn on oath, hereby deposes and says that he is one of the Plaintiffs and the President of the corporate Plaintiff in the above-entitled action, that he has read the foregoing Complaint, and acknowledges it to be true to the best of his knowledge and belief.

/s _____
Larry Holmberg

Sworn to and subscribed to before
me this ___ day of _____, 1991.
/S/_____
Notary Public

Supreme Court, U.S.
FILED
DEC 9 1996
CLERK

No. 96-727

In the
Supreme Court of the United States
October Term, 1996

ARNOLD HOLMBERG,

Petitioner,

v.

CITY OF RAMSEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF MINNESOTA

RESPONDENT'S BRIEF IN OPPOSITION

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6 pp

STATEMENT OF THE CASE

Petitioner's predecessor in interest owned and operated an adult business named the Amusement Center, Inc. The business opened in 1990 and consisted of the sale of sexually-explicit books, magazines, novelties and the on-premises viewing of adult movies. Appendix, at 92 (subsequently referred to as "A-_"). After the business opened, Respondent City of Ramsey ("City") adopted a comprehensive set of regulations regulating adult businesses.

Under the ordinance, adult uses were classified as either "adult uses-principal" or "adult uses-accessory." An adult-use principal is one that has more than 10% of its stock in trade or floor area allocated to, or more than 20% of its gross receipts derived from, any adult use. (A-47) An adult-use accessory is one that has 10% or less of its stock in trade or floor area allocated to, or 20% or less of its gross receipts derived from, an adult use. (A-47) The ordinance provided that adult uses-principal must be located at least 1000 feet from certain protected uses, including residential zones, daycare centers, schools, on-sale liquor establishments, and churches. (A-99) Petitioner's business violated the ordinance because it was an adult-use principal and was located within 1000 feet of residentially zoned property, a daycare center, a church, and an on-sale liquor establishment. (A-100)

Petitioner unsuccessfully challenged the constitutionality of the City's ordinance in a federal court action. Schneider v. City of Ramsey, 800 F.Supp. 815 (D.Minn. 1992), aff'd sub nom. Holmberg v. City of Ramsey, 12 F.3rd 140 (8th Cir. 1993), cert denied, 115 S.Ct. 59 (1994) ("federal lawsuit"). After the federal lawsuit was completed, the City brought an action in state court seeking declaratory and injunctive relief to prevent Petitioner from operating the business in violation of the ordinance. In opposing the City's request, Petitioner contended that the nature of the business had changed so that the federal lawsuit was no longer applicable. Specifically, Petitioner contended that he changed the business by eliminating the on-premises viewing of sexually-explicit

material and by adding non-adult materials so that only 25% of the stock in trade and floor area were devoted to sexually-oriented materials. (A-4) Petitioner contended that because the nature and operation of the business has changed, the federal litigation was no longer binding on the "new" business even though the "new" business still constituted an adult-use principal. (A-4)

The Minnesota Court of Appeals affirmed the trial court's decision granting summary judgment in favor of the City. In doing so, the court of appeals concluded that the ordinance was a content-neutral time place and manner regulation, that the studies relied upon by the City were reasonably related to the type of business that Petitioner was conducting and that there was no requirement that the City conduct any new studies. (A-7 to A-9) The Minnesota Supreme Court denied review. (A-1)

ARGUMENT

THE MINNESOTA COURT OF APPEALS HAS NOT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THE SUPREME COURT.

Petitioner contends that certiorari should be granted because the state court decision conflicts with "the highest courts of other jurisdictions ... and this court's holdings." (Petition, p.13) The "decision" by the Supreme Court was a decision to deny review. The only substantive decision by an appellate court in this case is the court of appeals decision. The Minnesota Court of Appeals is not a court of last resort. Consequently, whether or not the decision conflicts with the highest courts of other jurisdictions is not a basis for granting certiorari. Sup. Ct. R. 10(b). The applicable standard in this case is whether the court of appeals decision has decided an important federal question in a way that conflicts with relevant

decisions of this Court. Sup. Ct. R. 10(c). Petitioner has not demonstrated that this standard is met in this case.

The Supreme Court has established a three-part test to determine whether a statute or ordinance regulating adult businesses is constitutional. A court must determine: (1) whether the statute or ordinance is a content-neutral time, place, and manner restriction; (2) whether the government has a substantial interest in regulating adult businesses which is unrelated to the suppression of free speech; and (3) whether the ordinance allows a reasonable opportunity for adult businesses to locate in the city. City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 106 S. Ct. 925 (1986). The first and third prong of this test were indisputably decided in the City's favor in the federal lawsuit and are not an issue in this petition. Petitioner contends that the ordinance does not meet the second prong of the Renton test because the ordinance is overbroad. (Petition, p.13)

In Renton, this Court held that a city may establish its substantial interest by compiling a record with evidence that may be reasonably believed to be relevant to the problem that the city desires to address. Renton, 475 U.S. at 51-52. A city's justifications are not necessarily conclusory and speculative because the city's opinion is based upon studies of other communities. Id. at 50. A city "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." Young v. American Mini Theatres, Inc., 427 U.S. 50, 71 (1976). Petitioner contends that the ordinance is "overbroad" because it is not limited to a category of land uses, i.e., adult businesses with off-premises consumption only, that have been shown to cause adverse secondary effects. That, however, is the exact issue that a court must address in determining whether an ordinance regulating adult businesses is designed to serve a substantial governmental interest. The court of appeals rejected Petitioner's claim and in doing so, expressly relied upon Renton. (A-7) Far from deciding a question that conflicts with applicable Supreme Court decisions, the court of appeals expressly followed Supreme Court decisions.

In addition, the Court of Appeals expressly relied upon the Eighth Circuit interpretation of Renton as set forth in ILQ Investments, Inc. v. City of Rochester, 25 F.3d 1413 (8th Cir. 1994), cert. denied, 115 S.Ct. 578 (1994). The Court of Appeals decision is consistent with both Renton and ILQ.

The cases relied upon by Petitioner do not support a conclusion that the court of appeals decision conflicts with Renton. Two of the cases relied upon by Petitioner, Pringle v. City of Covina, 155 Cal.App.3d 151, 171 Cal.Rptr.251 (1981) and Tollis v. San Bernadino County, 827 F.2d 1329 (9th Cir. 1987), are both cases where a city attempted to apply its adult entertainment ordinance to a single showing of a sexually explicit motion picture. Those cases clearly are not on point.

Petitioner's reliance on Z. J. Gifts v. City of Aurora, 932 F.Supp. 1256 (D. Colo. 1996) is also misplaced, because that decision misapplied the Renton test and is inconsistent with virtually all other federal appellate court decisions. The court in Z. J. Gifts concluded that the Eighth Circuit's rationale in ILQ was "flawed" because it was directed more toward the subjective intent of the city council than the objective effects on the freedom to communicate. Id. at 1258. What the court overlooked, however, is that in a constitutional sense, it is not necessary for a court to scrutinize the studies relied upon by a local government to determine whether they address the precise nature of the activities occurring in the adult establishment. Wall Distributors, Inc. v. City of Newport News, 782 F.2d 1165, 1169 (4th Cir. 1986). Judicial review of the city's decision "goes only to whether the legislative determination of justification and fitness is not facially without factual support, hence not arbitrary and capricious." Id.

Similarly the recent United States Supreme Court decision in 44 Liquor Mart, Inc. v. Rhode Island, ____ U.S. _____, 116 S.Ct. 1495 (1996) is of no help to Petitioner. In that case, the purpose of the state law was to prohibit the advertisement of retail liquor prices except at the place of sale. This Court held that a state does not have the authority to suppress truthful, non-misleading information. In this case, the City has regulated, not prohibited, adult establishments, and this Court

has concluded in Renton that the City has the authority to regulate adult businesses that are protected by the First Amendment.

Petitioner also goes to great length to try to demonstrate that the record before the court of appeals in this case is different than the record before the court in ILQ. The City strongly disagrees with that statement, but in any event that argument is insufficient for this Court to grant the extraordinary relief requested by Petitioner. At best, Petitioner's complaint is that the state court made erroneous factual findings or misapplied the rules set forth in Renton. Neither one of those factors justify review by this Court. "A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

CONCLUSION

Petitioner has not demonstrated a compelling reason for this Court to grant review. The City respectfully requests that the petition is denied.

Respectfully submitted this 9th day of December, 1996.

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